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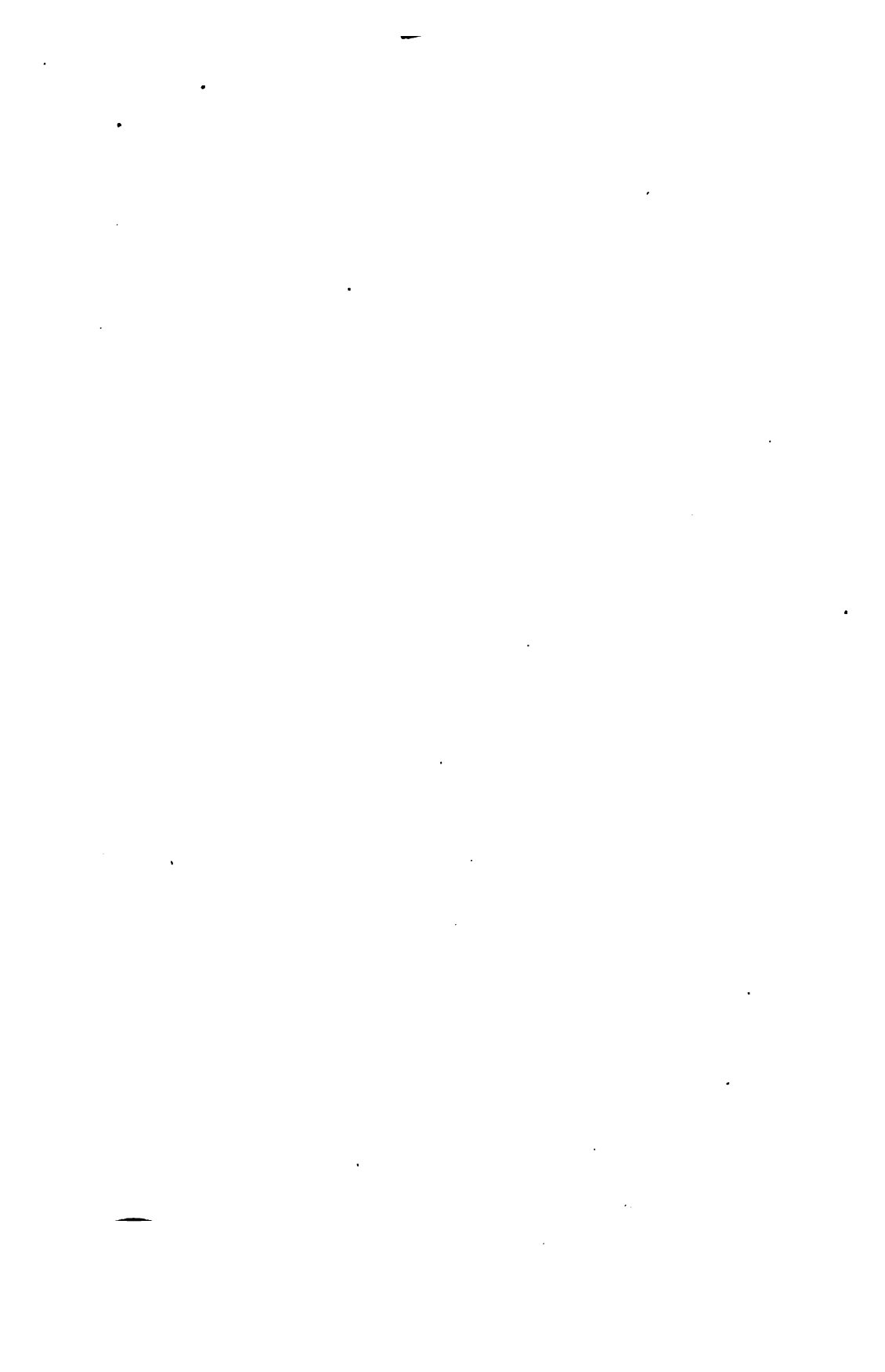
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241
6
REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF COLORADO,

CONTAINING

ALL CASES DECIDED AT THE DECEMBER TERM, 1883,
THE APRIL TERM, 1884, AND THE SPECIAL
OCTOBER TERM, 1884.

BY L. B. FRANCE.

VOL. VII.

CHICAGO:
CALLAGHAN & COMPANY, PUBLISHERS.
1884.

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Entered according to act of Congress in the year eighteen hundred and eighty-four,
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JUSTICES OF THE SUPREME COURT
OF THE
STATE OF COLORADO.

WILLIAM E. BECK, CHIEF JUSTICE.

WILBUR F. STONE, }
JOSEPH C. HELM, } JUSTICES.

JAMES A. MILLER, CLERK.

DAVID F. URMY, ATTORNEY GENERAL.

TABLE OF CASES REPORTED.

A.		PAGE.
	PAGE.	
Adams, Wells et al. v.	26	
Alden, Impl., v. Carpenter.	87	
Alexander et al. v. The People ex rel.	155	
Allen, Kiskadden v.	206	
Anderson et al. v. Bartels.	256	
Atkinson et al. v. Tabor et al.	185, 451	
Arthur, Adm'r, Israel et al. v. 5, 12		
B.		
Barker et al., Weese v.	178	
Barnett et al. v. Knight et al.	365	
Bartels, Anderson et al. v.	256	
Barth et al. v. Jones et al.	464	
Bassett v. Inman.	270	
Bates et al., Brooks v.	576	
Bayer v. City of Denver.	113	
Bean v. Gregg.	499	
Bean v. People ex rel.	200	
Betts v. People ex rel.	453	
Bischelberger, Small et al. v.	563	
Board Com'rs Gunnison Co. v. Owen et al.	467	
Brandenburg v. Reithman, 323, 480		
Brandenburg v. Mills.	537	
Brewer v. Hughes.	583	
Bricker, Richardson v.	58	
Brooks v. Bates et al.	576	
Brown v. Tucker.	30	
Brown, Coffman et al. v.	147	
Brown v. City of Denver	305	
Bruckman v. Taussig.	561	
Buck v. Webb et al.	212	
C.		
Carpenter, Alden, Impl., v.	87	
Carroll, Overland M. & E. Co. v.	43	
Cary v. McIntyre.	173	
Chapman et al. v. Pocock et al.	204	
Cheesman et al., The People ex rel. v.	876	
Church, Denver, W. & P. R'y Co. v.	143	
Coby, Rio Grande Extension Co. v.	299	
Coffman et al. v. Brown.	147	
Cohen v. The People.	274	
Colorado Cent. R. R. Co. v. Martin.	592	
Commissioners of Grand Co., The People ex rel. v.	190	
Cook, The Saxonia M. & R. Co. v.	569	
Cramer, Herfort v.	483	
Cummings et al., Hughes v.	183, 202	
D.		
Daniels et al. v. Lewis et al.	430	
Davis v. The Excelsior Co.	436	
De Lappe v. Sullivan	182, 184	
De Walt v. Hartzell et al.	601	
District Court, The People ex rel. Barnes v.	462	
Dorr v. Hammond.	79	
Denver, S. P. & P. R'y Co. v. Riley.	494	
Denver, W. & P. R'y Co. v. Woy et al.	556	
Denver & R. G. R'y Co. v. Otis et al.	198	
Denver S. P. & P. R'y Co. v. Wilson.	101	
Denver, W. & P. R'y Co. v. Church.	143	
Drake et al., Toenniges v.	471	
Ducket et al. v. Price et al.	84	
Duke, James v.	282	
Dunsmore, City of Denver v.	328	
Dusing v. Nelson.	184	
E.		
Edwards, Tucker, Ex'r, v.	209	
Ellison, Salisbury v.	167, 308	

	PAGE.		PAGE.
Emery v. Yount.....	107	Kellerman v. The Crescent M. & E. Co.....	295
Excelsior Co., Davis v.....	436	King v. The People.....	224
Exchange Bank v. Ford et al..	314	King, Adm'r, Leitensdorfer v.	436
		Kiskadden v. Allen.....	206
F.		Knight et al., Barnett et al. v.	365
Fairchild, Smith et al. v.....	510		
Ferrier, Morrell v.....	22	L.	
Fleming et al. v. The People ex rel.....	230	Leitensdorfer v. King, Adm'r.	436
Ford et al., Exchange Bank v.	814	Lewis et al., Daniels et al. v....	430
Francis et al., Wells v.....	396		
Frink et al., Sieber v.....	148	M.	
Fullerton et al., Assignees,		Mackey v. Fullerton et al.....	556
Mackey v.....	556	Manville v. Parks et al.....	128
G.		Martin, Colorado Cent. R. R. Co. v.....	592
Gavett, O'Connell v.....	40	Mathesus, Willard v.....	76
Garvey's Case.....	384	Meyer M. Co., Glass-Pendery C. M. Co. v.....	51
Garvey, In re.....	502	Miles, Brandenburg v.....	587
Gill, The New York & B. M. Co. v.....	100	Mooney v. People.....	218
Glass-Pendery C. M. Co. v. Meyer M. Co.....	51	Morrell v. Ferrier.....	23
Going et al., Owen v.....	85	Mullen et al., The City of Denver v.....	345
Gregg, Bean v.....	499	Murphy v. Hobbs.....	541
Green, Adm'r, v. Taney.....	278	McIntyre, Cary v.....	178
Green, The People ex rel. v.	237, 244		
H.		N.	
Hammond, Dorr v.....	79	Nelson, Dusing v.....	184
Hartman et al., Weber v.....	13	New York & B. M. Co. v. Gill.	100
Hartzell et al., De Walt v.....	601	Nathrop, Adm'r, Jones et al. v.	1
Hobbs, Murphy v.....	541		
Herfort v. Cramer.....	483	O.	
Hughes v. Brewer.....	583	O'Brien, Stone v.....	458
Hughes v. Cummings et al.	188, 208	O'Connell v. Gavett.....	40
I.		Osborne, The People ex rel. v.	605
Irwine et al. v. Wood et al.....	477	Otis, Denver & R. G. R'y Co. v.	198
Israel v. Arthur, Adm'r, et al.	5, 12	Overocker et al., Tripp et al. v.	72
In re Garvey.....	502	Overland M. & E. Co. v. Carroll.....	43
Inman, Bassett v.....	270	Owen et al., Com'rs of Gun-nison Co. v.....	467
J.		Owen v. Going et al.....	85
Jackson, Wilcox et al. v.....	521	P.	
James v. Duke.....	232	People ex rel., Alexander et al. v.....	155
Jobs, The People ex rel. Mills v.....	475, 589	People ex rel. Barnes v. Dis-strict Court.....	462
Jones et al., Barth et al. v....	464		
Jones et al. v. Nathrop, Adm'r.	1		

TABLE OF CASES REPORTED.

vii

	PAGE.
People ex rel., Bean v.....	200
People ex rel. v. Betts.....	453
People ex rel. v. Cheesman et al.....	376
People ex rel. v. City Bank of Leadville.....	226
People ex rel. v. Com'rs of Grand Co.....	190
People, Cohn v.....	274
People ex rel. v. Fleming et al.....	230
People ex rel. v. Green....	237, 244
People ex rel. v. Jobs....	475, 589
People, King v.....	224
People ex rel. v. Osborne....	605
People, Mooney v.....	218
People, Teller v.....	451
Parks, Tucker v.....	62, 298
Parks et al., Manville v.....	128
Pocock, Chapman et al. v.....	204
Poire v. Rocky Mountain T. Co.....	588
Price et al., Duckett et al. v....	84

R.

Ralph v. Weary.....	217
Rankin v. Thompson et al....	381
Reithman v. Brandenburg.....	323, 480
Richardson v. Bricker.....	58
Riley, The Denver, S. P. & P. R'y Co. v.....	494
Rio Grande Ex. Co. v. Coby....	299
Rocky Mountain T. Co., Poire v.....	588
Roe, Smith v.....	95

S.

Salsbury v. Ellison.....	167, 303
Sampson, Tabor v.....	426
Saxonia M. & R. Co. v. Cook	569
Schwenke et al. v. Union Depot & R. R. Co.....	512, 521
Sieber et al. v. Frink et al....	148
Simmons v. California Powder Works.....	235
Small v. Bischelberger.....	563
Smith v. Fairchild.....	510
Smith v. Roe.....	95
Snyder v. Voorhies, Ex'x.....	296
Solid Muldoon P. Co., Stevens v.....	86
Stark et al., Strepey et al. v....	614
Stevens v. Solid Muldoon P. Co.	86
Stone v. O'Brien.....	453
Strepey et al. v. Stark et al....	614

	PAGE.
Sullivan, De Lappe v.....	182, 184
Sweet v. Webber et al.....	443

T.

Tabor et al., Atkinson et al. v.	195, 451
Tabor v. Sampson.....	426
Taney, Green, Adm'x, v.....	278
Taussig, Bruckman v.....	561
Thompson et al., Rankin v....	381
Teller v. The People.....	451
Toenniges v. Drake et al.....	471
Tripp et al. v. Overocker et al.	72
Tucker, Brown v.....	80
Tucker v. Parks.....	62, 298
Tucker, City Bank of Leadville v.....	220
Tucker, Ex'x, v. Edwards....	209
The California Powder Works, Simmons v.....	285
The City Bank of Leadville, The People ex rel. v.....	226
The City Bank of Leadville v. Tucker.....	220
The City of Denver v. Bayer..	113
The City of Denver, Brown v.	305
The City of Denver v. Dunsmore.....	328
The City of Denver v. Mullen et al.....	345
The Crescent M. & E. Co., Kellerman v.....	295
The Denver, S. P. & P. R'y Co. v. Riley.....	494
The Denver, S. P. & P. R'y Co. v. Wilson.....	101
The Denver & Rio Grande R'y Co. v. Otis et al.....	198
The Denver, W. & P. R'y Co. v. Church.....	148
The Denver, W. & P. R'y Co. v. Woy et al.....	556
The Glass-Pendery C. M. Co. v. Meyer M. Co.....	51
The Rio Grande Ex. Co. v. Coby	299
The Union Depot & R. R. Co., Schwenke v.....	512, 521

U.

Union Depot & R. R. Co., Schwenke v.....	512, 521
--	----------

V.

Voorhies, Ex'x, Snyder v.....	296
-------------------------------	-----

TABLE OF CASES REPORTED.

W.			PAGE.
Weary, Ralph v.	217	Wilson et al. v. Denver & S. P. R'y Co.	101
Webb et al., Buck v.	212	Wood et al., Irwine et al. v.	477
Weber v. Hartman et al.	13	Woy et al., Denver, W. & P. R'y Co. v.	556
Webber et al., Sweet v.	443		
Wells et al. v. Adams.	26		
Wells v. Francis et al.	396		
Weese et al. v. Barker et al.	178		
Wilcox et al. v. Jackson.	521		
Willard v. Mathesus.	76		

Y.

Yount, Emery v.	107
-------------------------	-----

TABLE OF CASES CITED.

PAGE.		PAGE.
22	Adams v. Adams.....	577
187	Adams v. Trigg.....	536
58	Akridge v. Patillo.....	109
878	Alber v. Webster.....	136
187	Alvord v. McGaughey.....	240
87	Alvord et al. v. McGaughey...	421
356	Att'y General v. M. & E. R. R.	276
	Button v. Sawyer.....	415
470	Baird et al. v. People.....	
415	Banning v. Bradford.....	582
	Barker v. Knickerbocker Life	525
578	Ins. Co.....	273
338	Barnes v. District of Columbia	71
319	Barker v. Cassidy.....	447
587	Barn-dollar v. Patton.....	Carr's Adm'r v. Hurlbut's
391	Barnett v. The People.....	Adm'x..... 25
418	Barr v. Gratz's Heirs.....	Cary v. McIntyre..... 213
21	Barrett v. Lightfoot.....	Cassler v. Shipman..... 418
251	Beene v. The State.....	C. C. R. R. Co. v. Holmes.... 600
123	Beckett v. Midland R'y Co....	C. & G. Road Co. v. The People 234
598	Behrens v. K. P. R'y Co.....	Chamberlin v. Lyell..... 416
450	Belk v. Meagher.....	Chapman v. Toy Long..... 448
61	Bidwell v. Roger.....	Chapman et al. v. Chicago &
517	Blain v. Bailey.....	N. W. R'y Co..... 302
89	Blakeman v. Vallejo.....	Charles v. Eschelman..... 132
476	Board of Com'rs v. Owen.....	City of Atlanta v. Greene.... 125
89	Boggs v. The M. N. Co.....	City of Dayton v. Pease..... 338
507	Bollman, Ex parte.....	City of Detroit v. Blackby.... 338
535	Bowen v. Clark.....	City of Elgin v. Eaton..... 125
532	Bowie & Sons v. Napier & Co.	City Nat'l Bank v. Goodrich.. 523
242	Bradley v. Fisher.....	City of Richmond v. Long's
818	Brainard v. Jones et al.....	Adm'rs..... 388
525	Brainard v. Peck.....	Clayton et al. v. Clayton..... 7
5-9	Breen v. Richardson.....	Clayton v. Spencer..... 261
575	Bristol v. R. & S. R'y Co....	Clement v. Reitz..... 325
363	Broder v. Water Co.....	Coates v. Preston..... 318
341	Brooks v. Somerville.....	Coe v. Wise..... 334
508	Brooks v. The People.....	Cole v. Board of Supervisors. 517
417	Brown v. Cherry.....	Colo. Cent. R. R. Co. v. Mo-
517	Brown v. County Com'rs.....	landin..... 120
69	Brown v. Cummings.....	Colo. Cent. R. R. Co. v. Ogden. 103
548	Brown v. Swineford.....	Combs v. Chandler..... 301
	Browning v. City of Spring-	Combs v. Little..... 56
339	field.....	Commonwealth v. Adcock.... 503
56	Browning v. Wheeler.....	Commonwealth v. Harney.... 387
202	Buck et al. v. Collins.....	Commonwealth v. Hitchings . 74

TABLE OF CASES CITED.

PAGE.	PAGE.
Commonwealth v. McPike.... 391	Egberts v. Wood 170
Conda v. South Side R. R. Co. 496	Ellison v. Jackson Water Co.. 516
Conley et al. v. Supervisors... 517	English v. Johnson..... 622
Conley v. Morris..... 83	Erie City v. Schwingle..... 838
Conners v. Meir..... 65	Ernst v. Hudson River R. R.
Cook v. Ellis..... 543	Co 598
Cook v. Mann..... 526	Evans v. Williams..... 92
Cook v. Martin..... 25	Everett v. Council Bluffs.... 853-4
Cook v. Reynolds..... 84	
Cooper v. Ash..... 470	Farmers' L. & I. Co. v. Com-
County of San Mateo v.	mercial B'k..... 525
Southern P. R. R. Co..... 812	Farnan v. Childs 211
Coursin v. Pa. Ins. Co..... 410	Fay v. Parker..... 546
C., R. I. & P. R. R. v. Joliet.. 357	Felkins v. O'Sullivan 471
Crandall v. Bryan..... 317	Finnerty et al. v. Fritz..... 568
Crane et al. v. Chandler..... 523	First Cong. Church v. Miller.. 60
Crittenden, Ex parte..... 451	First Nat. Bank v. Hogan..... 302
Croghan v. Miner et al..... 415	Fisher v. Bowles..... 136
Crompton v. Platt..... 559	Fitts, Adm'r, v. Waldeck, imp. 103
Crosby et al. v. Smith et al... 515	Fletcher v. Oliver..... 469
Cruess v. Fessler..... 490	Florence, etc., R'y Co. v. Ward 55
Cummings v. Gossett..... 59	Frish v. Caler 91
Cummins v. Morris..... 273	
Daniels v. City of Denver.... 840	Gage v. Nat. Bank..... 818
Dambman v. White..... 70	Gale v. Myers..... 320
Davidson v. New Orleans..... 312	Galpin v. Page..... 141
Davis v. Randall..... 568	Garvey v. The People..... 388
Deitz v. Central..... 590	Gibbons v. Ogden..... 165
Decker v. Trilling et al..... 479	Gillette et al. v. Gaffney 169
Delaney v. The People..... 225	Gilpin v. Page..... 8
Denver, W. & P. R. R. Co. v.	Glover's Case..... 508
Church..... 199	Goddard v. Sutton..... 93
Derry v. Ross et al..... 55	Goldin v. Cockril..... 429
Detroit & M. R. R. Co. v. Van	Golden Fleece Co. v. Cable Co. 623
Sternberg..... 598	Gomer v. Chaffee..... 141
Devanney v. Eggenhoff..... 91	Good v. Martin..... 208
Dial v. Reynolds..... 415	Gottschalk v. C., B. & Q. R. R.
Dias v. The State..... 391	Co 120
Dickson v. Boyle..... 69	Goudy et al. v. Hull..... 8
Dickson v. Moffat..... 483	Graves v. G., C. & S. F. Co... 125
Dingee v. Becker..... 579	Gray v. Earl..... 71
Dougherty v. Creary 133	Greenwald v. Appell..... 578
Downing v. Florer et al..... 326	Green v. The Commonwealth. 508
Drake v. Davenick..... 187, 150	Green v. Taney..... 443
Dunlap v. Wilcox..... 217	Gregg v. Forsythe..... 418
Durkee v. The City of Janes-	Gregory v. Nelson..... 39
ville..... 232	Griffin v. Colver..... 4
Duryea v. Burt..... 133	Griffin v. Knisely 482
Dyson v. Ream..... 71	Griffith v. McCullum..... 355
Dyson v. Baker..... 473	Grinde v. The M. & St. P. R'y
	Co..... 105
	Gunn v. Barry 872
East and West India Docks v.	
Gattke..... 122	Hall v. Bray 810
Easton v. Salisbury..... 263	Hanauer v. Bartels 70
Eaton, etc., Co. v. Avery..... 494	Hargrove et al., Adm'rs, v.
Edwards v. Kearzey..... 372	Cooke..... 817
Edwards v. Leavitt..... 543	Harlan v. Smith..... 181

TABLE OF CASES CITED.

xi

	PAGE.		PAGE.
Harris v. Lester et al.....	8	Lawrence v. Evarts & Cooper.....	429
Hart v. Robinson.....	180	Lebanon M. Co. v. Con. Rep.	
Hartung Case.....	393	M. Co.....	181, 622
Haverly Inv. M. Co. v. How-		Lefler v. Field.....	71
cut.....	55	Lewis v. Harkins.....	415
Hayden v. Anderson.....	103	Lilly v. Randall.....	489
Head v. Hargrove.....	439	Lomme v. Kintzig.....	187
Henly v. The Mayor of Lyme.	332	Low v. Brinker.....	589
Hepburn v. Jones.....	56	Low v. Henry.....	89
Hicks v. Murray.....	68	Lord v. Graham.....	585
Higgins v. Brown.....	85	Louisville, N. O., etc., R'y Co.	
Higgins v. Halligan.....	482	v. Johnson.....	146
Hildebrand, Adm'r, v. The To-		Lyall & Taylor v. Sanbourn...	136
ledo, etc., R'y Co.....	105		
Hill v. Robbins.....	559	Machette v. Wanless.....	70
Hoff v. Baum.....	482	Mack v. Burt.....	482
Holland v. Drake.....	535	Mahoney v. Winkle.....	180
Hooker v. The New Haven &		Manning, Bowman & Co. v.	
N. H. Co.....	120	Keenan et al.....	164
Hooper v. Wells, Fargo & Co.	50	Manville v. Parks.....	150
Hopkins v. Noyes.....	450	Martin v. Aston.....	470
Horner et al. v. Starkey.....	59	Martin v. Broach.....	25
Horner v. Stout.....	423	Martin v. Force.....	141, 589
Housh v. The People.....	141	Mason v. Eldred.....	11
Howard v. The Alleghany Val-		Mattacks v. Chadwick.....	61
ley R. R. Co.....	496	Maynard v. Frederick.....	55
Howard v. Daly.....	573	Mayo v. Boston & Maine R. R.	341
Howard v. Sexton.....	56	Mayor of Lyme v. Turner....	335
Howe v. Duff.....	587	McArdle v. McArdle.....	91
Humphreys v. Mooney.....	338	McCarthy v. Metropolitan	
Hunt v. Bailey.....	482	Board of W.....	122
Hunter v. Lester.....	474	McCord v. Cooper.....	429
Hutchings v. Ebler.....	181	McDaniel v. Correll.....	11
		McGehan, Ex parte.....	508
Inslee v. Flagg.....	56	McGuirk v. Burry.....	325
Israel v. Arthur.....	11, 13	McIntyre v. Barnes.....	177
Ives v. Finch.....	55	McKring v. Bull.....	91
		McMahon v. N. Y. & E. R. R.	495
Jackson v. Roby.....	447	McPherson v. The State.....	390
Jaric v. The Commonwealth..	276	Mears v. Com'rs of Wilming-	
Jansen v. The City of Atchi-		ton.....	339
son.....	339	Meeker v. Clegghorn.....	273
Jenkins v. Stranka.....	65	Merritt v. Judd.....	415
Johnson v. Parkersburg.....	125	Mersey Docks v. Gill.....	332
Jutte v. Hughes.....	492	Mersey Docks v. Pierce.....	332
		Metropolitan City R'y v. Chi-	
K. P. R'y Co. v. Miller.....	552	cago.....	356
K. P. R'y Co. v. Twombly....	341	Meyers v. Mott.....	89
K. P. R'y Co. v. Lundin, Adm'r.	552	Miller v. Barber et al.....	490
Kelley v. Natoma W. Co.....	153	Miller v. Baschore.....	61
Kelley v. Reed.....	429	Miller v. Miller.....	138
Kirby v. Ingersoll.....	586	Miller v. The People.....	276
Kinney v. Williams.....	552	Miller et al. v. Taylor.....	152
Koogler v. Huffman.....	418	Moore v. Bease.....	575
		Moore v. City of Atlanta.....	125
La Forge v. Jayne.....	61	Moore v. Metropolitan Bank..	301
Lange v. Jones.....	416	Morris v. Fraker.....	77
		Morse v. Hutchins.....	490.

	PAGE.		PAGE.
Myers v. Overton	474	Poire et al. v. Leadville Imp.	
Myers v. Spooner.....	181	Co.....	420
Nachtrieb v. Stover.....	552	Polk's Lessees v. Wendal.....	264
Nat'l B'k of Clinton v. Taylor.	582	Prince v. Lamb.....	563
Nebraska City v. Campbell....	338	Prince v. Griffin.....	418
Nelson v. Merriam.....	22	Pryor v. Downey.....	11
Nelson v. Rountree.....	11	Pumpelly v. Green Bay Co....	120
Newson v. Hart.....	16	Railroad Co. v. Jones.....	601
Newman v. Otto.....	65	Railway Co. v. Lavalley.....	103
New Orleans v. Steamship Co.	451	Reed v. The State.....	391
Northern Cent. R'y Co. v. Bas-		Reynolds v. Caldwell.....	496
tian.....	302	Ricket v. Directors of Metro-	
Norton v. Shepard.....	60	politan Railway Co.....	124
O. & M. R'y Co. v. Collarn....	108	Rice v. Coolidge.....	493
Ogden v. Saunders.....	166	Richardson v. McNulty et al..	623
O'Kane v. Treat et al.....	469	Rigney v. The City of Chicago	123
O'Neil v. N. Y., etc., Co.....	89	Rings et al. v. Burns et al....	421
Ophir M. Co. v. Carpenter....	153	Rippon, Ex'rs of, v. Ex'rs of	
O'Reilly v. Keons.....	496	Townsend.....	319
Ottawa v. La Salle Co.....	517	Robeke v. Andrews.....	460
Overton v. Alpha.....	56	Roberts v. Graham.....	493
Oxley v. Watts.....	20	Roberts v. Howard.....	483
Page v. Allen.....	162	Roberts v. Woods.....	416
Page v. Wells.....	491	Roby v. Jackson.....	447
Palmer v. Cowdry.....	7	Rose et al. v. Choteau.....	325
Palmer v. Way.....	308	Russell et al. v. The Men Dwell-	
Parker v. Duff.....	514	ing in the County of Devon..	331
Parnaby v. The Lancaster Ca-		Rucker et al. v. Fuller.....	434
nal Co.....	333	Rutland v. County Com'rs....	567
Partridge v. Badger.....	302	Sackrider v. McDonald.....	20
Patterson v. Wisner.....	514	Scales v. Paine & Co.....	573
Peacock v. Bell.....	141	Schwartz, In re.....	581
Peck v. The State.....	276	Sedgwick v. Gooding.....	61
Pennoyer v. Neff.....	34	Sellack v. S. H. T. Co.....	55
Peters v. Ulmer.....	211	Settember v. Putnam.....	133
People v. Com'rs of Grand Co.	475	Sexton v. Wheaton.....	109
People v. Edwards.....	480	Share v. Hoffman.....	493
People v. Lone et al.....	479	Shepherd v. Coniel.....	330
People v. Mahany.....	232	Shepherd v. The People.....	393
People v. Olevira.....	276	Sherman v. Buick.....	263, 514
People, etc., v. Rucker.....	609	Sika v. The Chicago & N. W.	
People ex rel. v. Cheesman....	513	R'y.....	515
People ex rel. v. Whitson.....	395	Simmons v. California P.	
People ex rel. Crawford v.		Works.....	295, 485
Lathrop.....	211	Skiles et al. v. Baker.....	33
People ex rel. Hughes v. Ap-		Skillman v. Lachman.....	133
pleton.....	252	Slater v. Dudley.....	373
People ex rel. Howell v. Cur-		Soper v. Henry County.....	338
ley.....	590	Sopries v. Webster.....	65
People ex rel. Parkinson v.		Southern Ex. Co. v. Moore....	49
Bissell.....	612	Speelman v. Chaffee.....	39
Phelps v. Selleck.....	581	Smelting Co. v. Kemp.....	264, 447
Pinneo v. Knox.....	325	Smith v. Briggs.....	495
Pittsburg & C. R. R. Co. v. Mc-		Smith v. Pipe.....	269
Cleery.....	599	Smoot v. Mayor of Wecumpka	339
		State v. Berdotte.....	356

TABLE OF CASES CITED.

xiii

	PAGE.		PAGE.
State v. Keddis.....	89	United States v. Robson.....	495
State v. Woodward.....	587	United States v. Southern Col-	
State ex rel. Clifford v. McMullen.....	613	orado C. & T. Co.....	269
State ex rel. Henderson v. County Court Boone Co.....	310	Vance's Heirs v. Maroney.....	7
State ex rel., etc., v. Maynard.....	591	Vandemaker v. Vermont C. R. R. Co.....	496
State ex rel., etc., v. Roberts.....	479	Van Schaick v. Winne.....	575
State ex rel. Robins v. County Court of New Madrid.....	310	Van Zandt v. Argentine M. Co.....	619
Stack v. The City of East St. Louis.....	126	Wall et al. v. Cameron.....	553
Stearns v. Aguirre.....	151	Wall et al. v. Livezey.....	343
Steinman, Ex parte.....	242	Warren v. McCarty.....	563
Stevenson v. Smith.....	69	W. C. & P. R. R. v. McElwee.....	341
Stewart v. Palmer.....	812	Webber et al. v. Townly.....	202
Stiles v. White.....	491	Weet v. Village of Brockport.....	338
Stillman v. Proprietors of Canal Bridge.....	343	Weightman v. The Corporation of Washington.....	387
Stocking v. The State.....	612	Wellington et al., Petitioners.....	159
Stoddard v. Chambers.....	263	Wells v. March.....	535
Stone v. Crocker.....	554	Wenner v. Thornton.....	141
Stoner v. The People.....	549	Western Union T. Co. v. Eyser.....	552
Stopplekamp v. Mangeot.....	431	White v. Robinson.....	56
Stratton v. The People.....	230	White v. Smith.....	491
Strong v. Wheaton.....	318, 319	Whitney v. Allaire.....	439
Sturgis v. Crowninshield.....	316	Whitney v. Bigelow.....	25
Sudam v. Swart.....	43	Wilde & Co. v. Haycroft.....	479
Sun M. Ins. Co. v. The Mayor.....	232	Williams v. Pritchard.....	517
Supervisors, etc., v. The M. & W. R'y Co.....	90	Williams v. Benton.....	150
Sussendorff v. Schmidt et al.....	100	Williams v. G., C. & S. F. Co.....	125
Tappan v. Gray.....	612	Willis v. The People.....	90
Taylor v. Armstrong.....	356	Wilson v. Supervisors Sutter County.....	469
Thomas v. Gain.....	312	Wilson v. York & M. L. R. R. Co.....	495
Thomas v. Mackey.....	109	Winship v. Bank.....	136
Thorp v. Rutland R. R. Co.....	608	Winton v. Spring.....	466
Threadkill v. Pintard.....	421	Wood v. Hustis.....	515
Tilton v. Larimer Co. Ag. A.....	567	Wood & Oliver v. Velleets.....	136
Tingley v. The People.....	276	Woodson v. O'Connor.....	56
Toledo, Wabash & W. R'y Co. v. Morrison.....	120	Wright v. Roach.....	491
Tompkins v. Brown.....	61	Yates v. Milwaukee.....	354
Town of Waltham v. Kemper.....	389	York Co. v. Cent. R. R.....	46
T. P. & W. R'y Co. v. Conroy.....	104	Young v. Slonetraker et al.....	187
Transportation Co. v. Chicago.....	120, 125	Zollars & H. C. C. M. Co. v. Evans.....	619
Trippe v. Overocker.....	470, 476		
Tucker v. Allen.....	56		
Tully v. Harlan.....	67		



R U L E S
OF THE
SUPREME COURT OF COLORADO.

The following amendments have been made to the rules of this court:

SCIRE FACIAS.

RULE II. In the third paragraph, all therein before the word *provided* was stricken out.

MOTIONS.

RULE XXIV. Rescinded, and in lieu thereof the following was adopted, to stand as Rule XXIV: "All motions, except motions for rules to file abstracts and briefs and for leave to withdraw transcript for abstracting, shall be in writing; and at least twenty-four hours' written notice of the time at which any motion will be heard shall be given the opposite party (unless such notice shall be waived), except in *ex parte* proceedings, or where no appearance shall be entered by the opposite party, and except on the third day of the December term, when, upon the regular call of the docket, rules may be taken by either party without the notice required as aforesaid."

REHEARING OF CAUSES.

RULE XXIX. The words, "If the same shall have been filed in term time, or if such opinion has been filed in vacation, then within the first five days of the next succeeding term," commencing in the sixth line of the printed rules, and ending in the tenth line thereof, were stricken out.

COSTS OF CLERK.

RULE LVII. Amended by adding thereto: "After final judgment shall have been entered in any cause in this court the clerk shall issue *remittitur* to the court below; or, if an original proceeding, issue a certified copy of the final judgment, upon payment, by the party desiring such *remittitur* or copy of final judgment, of the balance of costs due the clerk in the cause; and, if entitled thereto, the party paying such costs may have execution or fee bill out of this court therefor."



PROCEEDINGS
IN THE
SUPREME COURT OF COLORADO
UPON THE DEATH OF
HON. HENRY C. THATCHER,
FIRST CHIEF JUSTICE OF THE SUPREME COURT.

Upon the opening of court on the 28th day of March, A. D. 1884, the same being one of the days of the regular December term, A. D. 1883, the following remarks were made by the Hon. SAMUEL H. ELBERT, ex-Chief Justice:

May it please your Honors: At a meeting of the State Bar Association, held upon yesterday, resolutions were passed touching the death of the Hon. HENRY C. THATCHER. I was deputed by the association to present these resolutions to this honorable court, and ask that they be spread upon the records of the court. I now ask, may it please your honors, that these resolutions be spread upon the records of this court, over which for three years he presided as the first chief justice of the state; over the honor and high standing of which he watched with such jealous care, and which so largely owes to his learning and ability the high esteem in which it is held by the people of this state.

Of that personal loss which so many of us feel to-day, it is not permitted to speak upon an occasion like this. Our personal loss is overshadowed by that greater loss to the profession and the state which his death entails.

It not unfrequently happens, upon occasions like this, that there is that in the character or life of the deceased of which we may not speak, and to which we must extend the charity of silence. It is one of the gratifications of this occasion, if such a word may be used upon an occasion so sad, that we may speak of our deceased friend and brother without limit or qualification. There is no point in his record at which eulogy must halt and lower her voice. There was no defect.

of character or vicious habit of life over which, with averted gaze and backward step, we must cast a covering.

It was my good fortune to know Judge THATCHER intimately and well. For three years we were associated upon this bench. For three years we came and went together in the discharge of our judicial duties, and in the enjoyment of a most intimate and delightful intercourse. Of those years I have nothing but pleasant memories. As a man, he was upright in his walk, generous in his impulses, faithful in his friendships, and most kind and noble in all his feelings and aspirations. Those who knew him best, loved and esteemed him most.

As a citizen, he was active, public-spirited and faithful in the discharge of his duties. Every good work, every institution for the advancement and elevation of his fellow man, received his encouragement and support. Purity in public life and purity in political methods found in him a zealous advocate.

It was as a jurist that I knew him best. He was a most excellent judge. He was pure, conscientious, clear-sighted and learned. He was careful, painstaking and laborious. His investigations were most thorough, and no fact connected with the case he was considering escaped his attention.

Judge THATCHER never wrote a slovenly opinion. He knew distinctly and clearly the conclusions he had reached, and the process of reasoning by which he had reached them, and his statement and his argument were always clear, accurate and logical. His mind was analytical, and he threaded the intricate mazes of a difficult legal question with a steady step and clear eye, that made him a most valuable member of this court, and would have made him a valuable member of any court.

Above all, he was pure and incorruptible, presenting a judicial character, the purity of which was as the snow, and the integrity of which was as the granite.

Had his life been spared, that it would have been one of great usefulness and value, and that he would have merited other positions of trust and honor, cannot be doubted. We cannot, however, compute our loss. Of the value of such a life there is no measure. And thus dropping into his untimely grave all that is kind and generous in eulogy, we bid this good, true, upright and manly man farewell. We turn again to the struggles of life, the weaker, it is true, by reason of his death, the stronger, it is also true, by reason of his life.

The resolutions of the Bar Association were then read by Judge ELBERT, as follows:

WHEREAS, In the wisdom of Providence, the Hon. HENRY C. THATCHER, late chief justice of our supreme court, has been removed from our midst by death, therefore,

Resolved, That in the death of Judge THATCHER the profession has

lost one of its most worthy, able and distinguished members, the state one of its best and most highly esteemed citizens, and society a strong, true, generous, noble-hearted gentleman.

Resolved, That this sense of loss is the greater, as in all the relations of life he was not only exemplary, but strong; his early life of usefulness, in virtue of his high character and trained intellect, giving unequivocal promise of a life of yet greater usefulness and distinction.

Resolved, That we remember with pride and commemorate with pleasure the valuable services he rendered the state, first in the constitutional convention in framing our fundamental law, and afterwards, as first chief justice of the state, in shaping its jurisprudence in a long series of well considered opinions, which remain in our reports, an enduring monument of his ability and learning as a jurist.

Resolved, That we deeply feel for his bereaved widow and family in this hour of their great affliction, and hereby tender them our sincere sympathy.

Resolved, That a copy of these resolutions be presented to the supreme court of the state and the circuit court of the United States, with the request that they be spread upon their records; also, that a copy be sent to his sorrowing family.

S. H. ELBERT,	} Committee.
BELA M. HUGHES,	
E. T. WELLS,	
S. E. BROWNE,	
A. J. SAMPSON,	

CHARLES E. GAST, Esq., of the Pueblo bar, then spoke as follows:

May it please the Court: At a meeting of the Pueblo bar, a committee was appointed to draft resolutions expressive of our sense of bereavement at the death of HENRY C. THATCHER, and having been so directed, it becomes my painful duty to present the same here and request that they be entered upon the minutes of this honorable court, over which he presided for three years as chief justice.

It is proper that we should take this occasion to pay tribute to his memory, to attest our affection for his manly character, and to record our appreciation of his judicial labors. It is true, though, that grief can but feebly be expressed in words. The esteem in which we held him during life can witness better than eulogistic words the feelings of loss we experience by his death.

The personal affection we cherished toward Judge THATCHER was a matter of growth; it had proportion to the intimacy of our association with him. Those who knew him longest loved him best. He was not a person whose good fellowship shone with meteoric brilliancy at first acquaintance, or who won a fleeting popularity by mere cordial hand-

shakings. On the contrary, there was a seeming pre-occupation in his manner, which gave no clue or insight to the depths of hearty, generous feeling and strong personal attachment with which his nature was endowed. He was in all things sincere, and made no effort to cultivate an artificial cordiality. Nevertheless there are few men whose friendships were more extensive.

With but a slight acquaintance one readily saw that his manhood was genuine, that his *bonhomie*, if not brilliant, was an expression of a kind and generous heart, and accordingly no one commanded more lasting and endearing ties from all with whom he was brought into association. He was singularly free from malice. He had that ready appreciation of others' merits, that is a distinctive mark of a large and liberal mind.

During a practice of fifteen years at the bar, Judge THATCHER won deserved distinction. His mind was vigorous and comprehensive, his habits of application unceasing.

I was brought into intimacy with him years ago, and can speak of the industry and painstaking care with which he was constantly extending the foundations of his legal acquirements by research and analysis. Probably his most distinguishing traits as a practitioner were his zealous devotion to his client's interest, and his exhaustive preparation of causes for trial or argument. He never trusted to blind chance to extricate himself from possible legal difficulties. He foresaw and provided against them. His knowledge of the law was accurate, the result of patient labor aided by a keen, penetrating mind.

His experience at the bar was a fit training for the judicial office he was called to occupy when this honorable court was organized. As its first chief justice, he commanded the respect of the entire bar, and has left behind him a memory that will long be cherished throughout the state. He had the proper equipoise of character that is essential to a good judge. His temper was self-possessed and calm, and when he reached convictions he adhered to them with a conscientiousness that could not be influenced by fear or favor.

It was fortunate for the state that at the organization of this court it should be presided over by one whose attainments in the field of jurisprudence, and whose purity of character, gave confidence that, as a court, it would earn the respect of the bar, for it is to the judiciary that the most sacred interests of the people are committed. It is there we look for unswerving rectitude and intelligent thought, and if these are found wanting the entire economy of state government is imperiled. As a judge, he had a realizing sense of the ennobling dignity of the office. The scales of justice were with him evenly balanced, and the opinions which he delivered while a member of this bench evince that conscientious thoroughness and care that was always a marked characteristic of his legal training.

It is a sad announcement to say that he is no longer within the reach of human praise. It is doubly sad that his death should have come without admonition or warning. Starting on a pleasure jaunt, apparently in good health and with the most exuberant spirits, he is stricken down by a disease, the existence of which in his system he never suspected; at an age, too, when the promises of the future look bright and begin to disclose, when the full matured vigor of his mind was capable of accomplishments far exceeding those of the past. Judge THATCHER had not completed his career. He had possibilities before him which, if he had been permitted to live, with a mind expanding and strengthening, he might have attained, to his own credit and to the credit of the state. He had little to regret, everything to look forward to.

We would fail in our duty if we did not give lasting expression to our sense of grief. Nothing is left but the memory of the man, which the bar of the state will always fondly cherish. It will stand as a bright page in the judicial history of Colorado, and his brethren at the bar and his successors on the bench may draw inspiration from it, and read lines of character worthy of emulation and deserving of everlasting honor.

Mr. GAST then presented the resolutions adopted by the Pueblo bar, March 21, 1884, relative to the death of Judge HENRY C. THATCHER.

General SAMUEL E. BROWNE then moved that the resolutions and remarks be spread at length upon the records of the court, whereupon the court made response by Associate Justice STONE:

Gentlemen of the Bar: It was my good fortune to know HENRY C. THATCHER from almost the day he came to Colorado—in the fall of 1866—and settled in Pueblo, where I lived. Our acquaintance soon grew into a personal friendship, the intimacy of which continued unbroken to the day of his death. Living together in the same town, intimate in social and family relations, frequently pitted against each other in the strife of litigation, co-workers for many years while retained together by the same clients, traveling together over the wild stretches of mountain and plain embraced in the southern judicial district in the early days, and when almost every stopping place was a camping out together of the bench and bar; associated later on in the development of railways and other of the great industrial enterprises of the territory and state, representing the same non-partisan constituency in the formation of our state constitution; afterward serving together upon the bench of this court, and thus through nearly eighteen years, familiar with the out-goings and in-comings of his daily life, public and private, I have had ample opportunity of knowing the life and character of

our deceased brother almost as one knows a real brother. Congenial by education, profession and tastes, we were real friends, and the heartfelt sorrow which I feel personally at his death, is in some degree mitigated by the comforting reflection that although attached to different political parties, and so often representing opposing interests in public and professional life, I cannot now remember a single unkind word that ever passed between us in all the long years of our acquaintance.

HENRY CALVIN THATCHER was born in Perry county, Pa., April 21, 1842, and hence was a little less than forty-two years old at his death. He was educated at Franklin and Marshall College, Lancaster, Pa., at which school he graduated in 1864. He read law at Holidaysburg, and in the spring of 1866 graduated from the law department of the Albany University, N. Y. In the fall of the same year he came to Colorado, fresh from his student life, and his career as a man and as a lawyer began, developed and ended here. He was an industrious student, a deep thinker, a careful and conscientious lawyer. He was ever faithful to the interests of his clients, temperate in controversy, fair and courteous to his opponents and honest to the court. Without possessing the gift and advantage of fluency, aptness of illustration, and sustained oratory in extemporaneous speech, he shone brightest, not as an advocate, but as a counselor, pleader and jurist. He was but thirty-four years of age when he became the first chief justice of the state, and the fairness of his rulings, and the ability with which he mastered the difficult questions which arose in our jurisprudence incident to the transition from a territory to a state, the change in our practice from the common law forms to the civil procedure of the code system, together with the novel questions arising out of industries and conditions peculiar to this locality, are amply attested, not only by the recollection of his associates on the bench, but by his published judicial opinions, which stand as permanent memorials of his marked fairness and distinguished ability.

Few men possessed more kindness and liberality in disposition and character. There was no such thing as malice in his nature. He was one of the good men of his day and generation — "one of the salt of the earth." His place as a lawyer, as an exemplary citizen, and as a light in the judiciary of the state, will long remain vacant in the estimate of those who knew him best. While his reputation was known to the people of the country at large, his real character and the many excellencies, the brotherly kindness, constancy in friendship, genial humor, and attractive companionship of his inner life, hidden to the many by the diffidence of his nature, was known fully to the limited few, who, as his intimate friends, had come to know him thoroughly and fraternally. Claiming to thus know him, and to be thus favored with his valued friendship, it is with no ordinary feelings that in response to the resolutions that have been presented, and the well-

deserved eulogies that have been pronounced in this forum of which Judge THATCHER formed so conspicuous a part, I offer my humble tribute to the memory of his usefulness, his high example and his unnumbered virtues. May his life be a perpetual inspiration to us all, and his memory be ever blessed.

At the conclusion of Justice STONE's remarks, Chief Justice BECK spoke as follows:

Gentlemen of the Bar: The resolutions which have just been presented to the court, and the appropriate addresses made upon their presentation, well and forcibly express the deep sorrow felt by the bar of the state at the untimely death of our lamented brother and friend, Judge THATCHER. Equally well do they express the high estimate of his character entertained by his professional brethren. The court most cordially indorses the sentiments of the resolutions and addresses, and they will be spread upon its records as permanent mementos to the memory of the deceased.

My personal relations with him were so intimate that I have experienced a feeling of sadness and sense of bereavement at this unexpected calamity which has befallen us, that words do not fully express.

It is hard to realize that he who so lately mingled with us, in the very prime of life, and apparently in the enjoyment of health, has been stricken down, and now sleeps amid the great encampment of the dead, where all alike are "wrapped in silence deep and still." When, only a few weeks ago, I received the warm grasp of his hand, accompanied by his usual cheerful greeting, physical appearances gave no indications of his sudden dissolution, but, on the contrary, were more promising for length of days than to many of us who still survive, while his prospects for future successes and future honors were never brighter. Marvelous and sad to contemplate that in the brief interval which has since elapsed the fell destroyer has done his work, and our professional brother and intimate friend has crossed the dark river, passing forever from the known to the great unknown.

Incidents like this are well calculated to remind us that life is of uncertain tenure. They enable us to duly appreciate the simile: "The trees and flowers fall down before their time, and fade and wither in their bloom, and so do lives."

Although our brother's career was comparatively brief, his was a busy life, and he accomplished much in the period allotted him here. Endowed by nature with a comprehensive mind, which had been well cultured and disciplined by education and mental exercise, gifted with good judgment and strong practical sense, he had risen to a leading position at the bar, and the force of his character and attainments have left their impress upon the fundamental law and upon the jurisprudence of the state. He gave valuable assistance in framing the one

and in shaping the other, as the records of the constitutional convention and the opinions of the supreme court bear conclusive testimony. His public services have been alike valuable to the state and honorable to himself. By his death the state itself has sustained a most serious loss. As the first chief justice of the supreme court of the state, his opinions command respect for the research and ability displayed in their preparation, as well as for the soundness of the conclusions arrived at. Equally creditable is the spirit of impartial justice which pervades all his judicial deliberations. Honesty of purpose and a strong sense of right were controlling characteristics of his life, and, so far as we are advised, no one has been heard to say that HENRY C. THATCHER ever intended to deal unjustly by him.

These heartfelt tributes of respect, which we are to-day offering to his memory, do but simple justice to the character of a good and noble man. Our tributes may be short lived, but his valuable public services will be perpetuated in the history of the state, and the beauties of his life will long live in the hearts of his many friends.

Socially, he was devoted to his friends, of a cheerful disposition, and there was always about him a genial atmosphere which made the moments pass pleasantly in his society. These characteristics made him a large circle of warm personal friends, which extended to all parts of the state. It is said that cheerful people live long in memory. This sad event furnishes another opportunity for the verification of the proverb. But there is an inner circle of friends of the departed who were bound to him by the more sacred ties of kindred. Upon them the cruel blow has fallen with crushing force. The home circle mourns a kind, loving and indulgent husband and father, an affectionate son and brother. Here the melancholy affliction is most keenly felt; its consequences duly appreciated. It must afford some consolation to know that he has left to the loved ones the memory of an honored name and a legacy rich in the treasures of the heart. While this bereavement is greatly to be deplored, the contemplation of what he was will sweeten their memories of the deceased and tend to soften their anguish at his loss.

Let all the testimonials be spread upon the records of the court, and, as a further mark of respect to the memory of our lamented brother, the court will now adjourn.

CASES DETERMINED
IN THE
SUPREME COURT OF THE STATE OF COLORADO.

DECEMBER TERM, 1883.

JONES ET AL. V. NATHROP, ADM'X.

1. In an action brought on an implied liability, a defense setting up a written agreement which presented no valid defense, *held*, not to make the action one upon an express contract so as to defeat a recovery upon the implied obligation.
2. Damages for breach of contract can only be recovered when they are averred and proved as the natural, direct and certain result of the breach, excluding probable profits and prospective or speculative damages.

Error to District Court of Saguache County.

THE facts are stated in the opinion.

Mr. GEORGE P. UHL, for plaintiffs in error.

Messrs. WESTON and ROWELL, for defendant in error.

STONE, J. The plaintiffs in error were sued in the court below for the sum of \$2,000, claimed for the use of a steam saw-mill from December, 1880, to June, 1881. In their answer they admit the use for the time charged, but deny indebtedness therefor. They then allege that there was a written agreement for the sale to them of the saw-mill, and also a shingle mill, with stipulated terms of payment.

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7	1
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They also charge false and fraudulent representations respecting the machinery, and further aver that no shingle mill was ever delivered to them, and that Nathrop, at the time of the sale, did not have a shingle mill.

By way of cross-complaint they allege that Nathrop wrongfully took away the mill from them, and they claim damages for loss of profits which they would have made on lumber in the sum of \$5,000; for the wrongful removal of the saw-mill, \$1,000; for loss of shingle timber cut but not used, \$1,000; and for loss of profits on shingles which they would have made if they had been furnished the shingle mill as agreed, the further sum of \$1,500; total, \$8,500.

The claims of \$5,000 and \$1,500, for loss of profits on lumber and shingles, were demurred to. The demurrer was confessed as to the lumber claim, and overruled as to the claim for profits on shingles.

There was a replication admitting the written agreement of sale, but alleging that it contained a condition that the machinery was not to be moved out of the county of Chaffee without the consent of Nathrop, and avers that plaintiff in error did move the saw-mill out of the said county, and that thereupon said Nathrop took possession of the same, as by the terms of said agreement he had full power and lawful authority to do. The replication then denies the alleged false and fraudulent representations; denies the wrongful retaking of the mill; denies any damages by reason of such retaking, and denies any damage for loss of shingle timber. The cause was tried to a jury, who found a verdict for defendant in error, Nathrop, of \$180, and judgment was rendered accordingly.

The grounds of reversal are: *First*, that suit was brought on an implied contract and the defense pleads a written contract; hence, there was no good cause of action, since there cannot be both an implied and an express contract for the same cause of action at the same

time; *second*, that the cross-claims of \$1,500 for shingle profits, and \$1,000 for shingle timber, were uncontroverted, and hence, the plaintiffs in error were entitled to a judgment, notwithstanding the verdict.

The suit was brought upon an implied liability and promise to pay for the use of the saw-mill. The right to recover did not rest on the written agreement for sale of the mill. The latter, while set up as a defense to the action, presented no valid defense. On the contrary, as set out in the pleadings, it was evidence merely of an agreement to sell the machinery upon certain terms therein specified, without any provision respecting the use in case the sale should not be completed. The sale was not to be complete until the last payment was made, upon which there was to be a bill of sale executed and delivered. This agreement, moreover, provided that the mill should not be taken out of the county of Chaffee, and in case of a violation of this condition Nathrop should have the right to retake possession of the mill as his own property. This condition having been violated, as admitted by the pleadings, Nathrop, having retaken the property, sued for the use since; the plaintiffs in error, although admitting the use for the time claimed against them, had paid nothing on account of either the sale or the use of the mill.

As to the second ground of reversal, that the items of \$1,500 damages claimed for loss of profits on shingles and \$1,000 for value of shingle timber, were uncontroverted by the pleadings, and that, therefore, plaintiffs in error were entitled to a judgment for \$2,500 *non obstante veredicto*, we think the point not sustained, since the record shows that these items do not "stand uncontroverted," as argued. The replication expressly denies the item of loss of shingle timber. As to the item for loss of profits on shingles, the demurrer to this item as pleaded should have been sustained. The averment was, in effect, that if plaintiff below had delivered to defend-

ants a shingle mill, as he agreed to, said defendants would have made a large quantity of shingles, which they might have marketed at a profit, and that, therefore, as they aver, they have "sustained a loss of \$1,500 as profit on the shingles which they would have made if plaintiff had furnished said shingle mill." These damages, as alleged, are too remote, and merely speculative.

Damages for breach of a contract can only be recovered when they are averred and proved as the natural, direct and certain result of the breach, excluding probable profits and prospective or speculative damages.

To determine the application of the rule is often a perplexing question, but the rule itself is too well settled to require a citation of the numerous and familiar authorities in its support. Sedgwick, *Measure of Damages*, 72, 76 and note.

One of the numerous illustrations of the application of the doctrine is that cited by Mr. Sedgwick in the note *supra*.

Where one had agreed to furnish a steam-engine by a certain day to drive a planing and sawing mill, and through his default the mill was at a stand-still for a time for want of the engine after the stipulated day, it was held by the supreme court of New York that a fair price for the use of the engine and machinery during the time lost should be allowed, but the claim for loss of net profits, calculated from the amount of lumber the mill might have cut and planed, allowing usual prices for the work over running expenses and wear and tear, should be rejected as too uncertain.

See the leading American case of *Griffin v. Colver*, 10 N. Y. 489, for a full discussion of the subject, and where the rule is concisely stated that "profits which would have been realized but for the defendant's default are recoverable. Those which are speculative or contingent are not."

In the case before us there is no such averment as

shows the alleged damages to be the natural, certain and proximate result of the conduct of the party sought to be charged. Nor is there any averment that plaintiffs in error ever demanded the shingle mill after the alleged agreement to deliver it, and hence, the admitted acceptance and use of the saw-mill alone may properly give a presumption that there was an acceptance by plaintiffs in error of the part performance of the agreement and a waiver of the non-delivery of the shingle mill.

At all events, the case having been submitted to a jury upon the issues made by the pleadings and upon evidence which is not brought up here by the record, we cannot say that the jury, in rendering a verdict for defendant in error of \$180, instead of the \$2,000 sued for, did not allow such proper amount of the counterclaim of plaintiffs in error as the evidence warranted, and the judgment will not be disturbed. Judgment affirmed.

Affirmed.

ISRAEL V. ARTHUR, ADMINISTRATOR, ET AL.

1. In obtaining constructive service of process by publication, a strict compliance with the method pointed out by the statute must be observed.
2. If the record, being offered in evidence, shows affirmatively that the statute requiring service by publication was not complied with, it may be attacked in a collateral proceeding, and the recital therein that service was had does not change the rule.
3. The legislature may, by statute, validate judicial proceedings where the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their substantial rights. But it cannot, by retrospective legislation, give vitality to previous judicial proceedings which were void for want of jurisdiction over the parties.

Error to County Court of Larimer County.

THE facts are stated in the opinion.

7	5
7	12
8	192
7	5
15	148
7	5
18	150

Messrs. HAYNES, DUNNING and HAYNES, for plaintiff in error.

Messrs. WELLS, SMITH and MACON, and Messrs. RHODES, LOVE, BALLARD, BARNUM and McCORD, for defendant in error.

HELM, J. This action was brought by plaintiff in error in the court below for the purpose of establishing her right to the estate of John Arthur, deceased, as sole surviving heir at law. Plaintiff was married to the said Arthur in 1859; there was no issue from the marriage, and, unless divorced, plaintiff was his wife at the date of his decease, and entitled, under the statute, there being no will, to inherit his entire estate.

Defendants in the court below were deceased's brother, who was also administrator of the estate, and certain nephews and nieces, who were interested therein as heirs, provided plaintiff failed in establishing her right thereto.

At the trial, the court admitted, over plaintiff's objection, the records and judgments in two divorce actions brought against her by the said John Arthur during his life-time.

The first of said actions was instituted in the probate court of Larimer county, and on February 9, 1875, a decree of divorce was granted therein. The second was brought in the county court of said county, and on June 12, 1877, a similar decree was again entered.

Two of the errors assigned attack the correctness of the court's rulings admitting in evidence the records of these divorce suits.

The Code of Civil Procedure did not become a law until October, 1877, and consequently both of these actions were brought and the service of process therein was attempted under the practice prevailing in Colorado before that instrument was adopted. Each of the records admitted in evidence shows on its face that the summons was issued and returned on the same day, and that the

court relied, for its jurisdiction over the person of defendant, upon an attempted service of notice by publication.

In obtaining constructive service in this way a strict compliance with the method pointed out by statute must be observed. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by law in connection therewith. The statute at the time these actions for divorce were commenced commanded the "usual exertion on the part of the sheriff to serve the summons," notwithstanding the proceedings by publication. Revised Statutes of Col. ch. 13, § 8.

And it has been held by this court that in divorce suits, under that practice, "a return *non inventus* before the return day of the writ would not support a notice by publication, and left the court without authority to proceed to judgment." *Clayton et al. v. Clayton, Heir, etc.* 4 Col. 410; *Vance's Heirs v. Maroney, etc.* 4 Col. 47; *Palmer v. Cowdry*, 2 Col. 6.

Neither the probate nor the county court, in these actions, had obtained jurisdiction over the person of defendant; both were without authority to "proceed to judgment," and consequently both decrees were absolutely void.

But it is argued by counsel: *First*, that these decrees are not subject to collateral attack in this proceeding; *second*, that in any event the finding of the county court in the latter, that "due service by publication has been had on said defendant," is conclusive upon the question of service, and fortifies *that* decree against such an attack.

There is some conflict of authority upon the question as to whether, in an attempt to secure constructive service by publication, any presumption of regularity will be indulged in, the record being entirely silent. It has been held that a compliance with the material requirements of

the statute must appear on the face of the record. On the other hand, courts of high authority have announced that such presumptions are applicable to the proceedings of courts of superior jurisdiction, whether such proceedings rest upon actual or constructive service. It is unnecessary, however, for us, in the case at bar, to determine this question.

For where the record is not silent on this subject, and where it affirmatively appears therein that the court did not have jurisdiction of the person, certainly no such presumption can be indulged in. *Clayton v. Clayton, supra; Galpin v. Page*, 18 Wallace, 336.

And the finding in one of these records, that due service of process had been had, is not conclusive. We are not prepared to accept, without qualification, the doctrine upon this subject stated in *Goudy et al. v. Hall*, 30 Ill. 116, relied upon by counsel for plaintiff in error; the opinion in that case *seems* to hold that the finding in the record of due and legal service is only *prima facie* evidence of that fact, and may be attacked in a collateral proceeding. Interpreted or understood without condition, it modifies the beneficent rule that judicial records import absolute verity. And its effect would be to subject them in many instances to collateral attack, where, upon principle and authority, they should be held conclusive.

In *Harris v. Lester et al.* 80 Ill. 307, the court use the following language with reference to a similar finding of service by the court which tried the cause: "In all collateral proceedings, we entertain no doubt, such finding is sufficient evidence of service by publication as to defendants, nothing appearing in the record to the contrary, and to warrant the decree, as in cases of regular notice by publication." This may fairly be said to modify the position taken in *Goudy v. Hall*, and is, we think, in accord with the weight of authority.

It sanctions the view that where, as in the case under

consideration, the record expressly recites the facts relied upon as constituting service, and those facts show clearly that no jurisdiction of the person was obtained thereby, it would be absurd to pronounce conclusive and binding a declaration therein that legal service was had. The record stultifies itself, and is not protected by the rule that such findings are decisive of the question in collateral proceedings.

The divorce records before us were offered by the parties to be directly and materially benefited thereby, and we are clearly of opinion that they were subject to collateral investigation.

In 1877 the legislature passed the following act, which was approved by the governor on the 1st day of March, viz.:

"WHEREAS, The probate courts of certain counties have heretofore exercised jurisdiction in divorce cases, and various parties have obtained decrees of said courts granting divorces, with the belief that the courts possessed jurisdiction in relation to said matters; and

"WHEREAS, Doubts exist as to the validity of said proceedings, and as to the right of said courts to exercise jurisdiction in the said matters;

"THEREFORE, Be it enacted as aforesaid: 'That all proceedings of any probate courts, the jurisdiction of which is, or may be, questioned as aforesaid, heretofore had in any case, so far as the same or any part thereof relate to the matters aforesaid, and to the jurisdiction of the courts therein, be, and the same are, in all respects legalized.'" General Laws, § 925.

It was generally supposed that the probate courts of the territory of Colorado had no jurisdiction in divorce proceedings; that such actions could only be brought and determined in the district court. The correctness of this supposition is questionable in view of the chancery jurisdiction conferred upon probate courts by the amendment to the Territorial Organic Act, approved March 2, 1863. Revised Statutes, p. 38, § 3.

But the state legislature, as appears from the foregoing act, shared sufficiently in the general belief on the subject to attempt to neutralize the effect of the supposed errors in question.

Counsel for defendants in error contend that this legislative enactment rendered valid and binding the decree of the probate court in 1875. They argue that although in that case the court may have had no jurisdiction, either of the subject-matter or of the person of defendant, this act was intended to and did cover and cure these defects.

Our state constitution provides that the general assembly shall pass no local or special laws for granting divorces. This provision deprives the legislature of the authority existing under the territorial organization to divorce husband and wife by statute. It still has power to declare what shall be necessary to constitute a valid marriage, and what grounds shall be sufficient to authorize a divorce. It may also provide the method of procedure by the courts upon application thereto for such relief. But it cannot, under this constitutional provision, assume judicial powers and sever the bonds of matrimony in a given case.

If the legislature in 1877 could not do this directly, could it accomplish the same result indirectly? Could it, by statute, give vitality to the decree of a court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

The legislature may, by statute, validate judicial proceedings, when the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their *substantial rights*. But it cannot, by retrospective legislation, give validity to previous judicial proceedings, which were void for want of jurisdiction over the parties. Two reasons may be assigned for this inhibition: *First*, because it would be an exercise of judicial power not contemplated by our constitution — see

art. III; *second*, because it would operate to deprive parties of their "day in court;" property rights might be divested without notice to those interested, and without giving them the opportunity to be heard. See § 25, Bill of Rights; *Mason v. Eldred*, 6 Wallace, 239; Cooley on Const. Lim. *107, and cases cited in notes.

A decree of divorce generally affects the property rights of the parties as well as their marital relations. *Israel v. Arthur*, 6 Col. 85.

"Upon this question we cannot doubt or hesitate. They (the legislature) can no more impart binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed to do the one is to accomplish the other." *McDaniel v. Correll*, 19 Ill. 226.

"If it was competent for the legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered, when before he was not bound at all; for such is the direct result. It is a proposition not to be discussed at this day, that the legislature has no such power." *Nelson v. Rountree*, 23 Wis. 370. See *Pryor v. Downey*, 50 Cal. 403; Wade on Retroactive Laws, § 164.

The statute of 1877 cannot be held to cure the defect of want of jurisdiction over the person of defendant in the divorce action of 1875. It is doubtful if the legislature intended this statute to produce any such consequence. The act itself, viewed in the light of the preamble thereto, seems to indicate that it was simply the intention to remedy the defect of want of jurisdiction over the subject-matter, where the court had complied with the law in obtaining jurisdiction over the person. It is unnecessary for us to consider the constitutionality of the act, in this view of its supposed design and operation, further than is necessarily implied by the foregoing discussion.

The records of the divorce proceedings should have

been excluded by the court; for error in admitting them the judgment must be reversed and the cause remanded.

We may deplore the effect of these conclusions in this particular case. But the consideration of hardship to these defendants therefrom must not be permitted to influence our judgment upon the questions presented. In the language of Mr. Justice Elbert, in *Clayton v. Clayton*, *supra*: "It cannot avail against the greater hardship of concluding parties by adjudications of their most sacred rights in proceedings of which they have no notice, and to which they have never appeared."

Reversed.

ISRAEL V. ARTHUR, ADMINISTRATOR, ET AL.

The decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review of the decree when property rights are involved.

Error to County Court of Larimer County.

Messrs. HAYNES, DUNNING and HAYNES, for plaintiff in error.

Messrs. WELLS, SMITH and MACON, and Messrs. RHODES and LOVE, BAILLARD, BARNUM and McCORD, for defendant in error.

HELM, J. John Arthur, now deceased, in his life-time brought suit and obtained a decree of divorce against his wife, who is the plaintiff in error herein. This writ is prosecuted for the purpose of reversing that decree.

The record of proceedings in that cause shows on its face that the court acted without obtaining jurisdiction of the person of the defendant. In the case of *Israel v. Arthur et al. ante*, p. 5, we have fully considered this record, and declared the proceedings of the county court

therein void and of no effect. The judgment and decree must be reversed.

This court has held that the decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review and reversal of the decree.

That "when property rights are involved, as in this case, the same reason exists for determining its validity as in civil cases generally." *Israel v. Arthur*, 6 Col. 85.

Reversed.

WEBER V. HARTMAN ET AL.

7	13
80	421

1. Under the statute (General Laws 1877, section 2563), no one but a householder is authorized to take up an estray animal, and he only when it is found in the vicinity of his residence.
2. Estrays cannot be lawfully used by the taker-up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner.
3. The using of estrays, save as to the exception mentioned, is tortious, and the taker-up thereby forfeits his claim for compensation.

Error to District Court of Arapahoe County.

THE facts are stated in the opinion.

Mr. A. W. BRAZEE, for plaintiff in error.

Messrs. BENEDICT and PHELPS and Mr. E. B. SLEETH, for defendant in error.

BECK, C. J. Chancellor Kent defines estrays as "cattle whose owner is unknown." 2 Kent's Com. p. 359. Blackstone says: "Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner thereof; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein." 1 Blackstone's Com. *297.

Our statute provides that "no person shall take up an estray animal except in the county where he resides and is a householder, nor unless the same be found in the vicinity of his residence." Sec. 2565, G. L. 1877.

It is extremely doubtful whether the estray law of this state was ever intended to embrace a case of a mere temporary straying a short distance from the residence of the owner and without fault or negligence on his part. It is more probable that its framers designed it to apply to cases of lost animals; those roaming around the country apparently without owners.

Where horses and cattle are free commoners, and in the absence of statute or ordinance prohibiting them from running at large, even in the streets and highways, it would seem to be an unwarrantable application of the estray law to take up such animals on first sight, without other evidence that they are estrays than the single facts that they have approached the residence of a householder, and that he happens not to know who their owner is.

The horse and mare sought to be replevied in this action were the driving team of the plaintiff in error, who is a resident of North Denver. They escaped from his lot into which he had turned them, and two days afterward came to the livery stable of defendant in error, Hartman, in the same city, situated on the corner of Holladay and Twelfth streets, and distant from the residence of the owner about a mile and a half.

Upon the same morning of their appearance at the stable they were driven into defendant's corral, adjoining the stable, and thereafter detained by him as estrays.

But for this seizure it is probable they would either have returned home, or been found by the owner, who was in pursuit of them, and who not only searched through the different divisions of the city for them, but through the entire neighborhood and surrounding country as well.

If, however, it be conceded that these animals were

estrays, within the meaning of the statute, it then becomes a grave question whether they were lawfully taken up and detained as such.

No one but a householder is authorized to take up an estray animal, and he only when it is found in the vicinity of his residence, as we have seen.

These animals were taken up in Mr. Hartman's absence, and without his knowledge or direction, by the employees in his livery stable. He says he returned to the stable about ten o'clock the same morning, and, finding the horses in the corral, inquired how they came there. He testifies that this was the first time he ever saw them.

On learning the facts he continued to detain them, and had them posted and recorded as estrays.

There is no evidence that the men who took them up and put them into the corral were persons authorized by statute to take up estray animals, nor is the defense based upon this ground, but upon the subsequent ratification of the act by Hartman, who was a qualified person.

The counsel for plaintiff in error contends that the statute must be strictly construed as to all its requirements; that the *taking up* is a material step in the proceedings, which can only be performed by a duly authorized person, and if done without authority, or by one not authorized by statute, the act is incapable of ratification. Upon this proposition the counsel cites numerous authorities, to the effect that, in summary proceedings of this character, the law must be strictly followed in all its details.

Counsel for defendants in error, on the other hand, treat this point as trivial, and insist that the subsequent ratification by Hartman, after learning the circumstances from his men, was equivalent to an original taking up by himself.

Upon examination of authorities, we find that such

eminent jurists as Judges Cooley and Christiancy consider the point a substantial one.

Newson v. Hart, 14 Mich. 235, is a case very similar to this, so far as this feature is involved. The statute under which that case arose authorizes "any resident freeholder of any township to take up any stray horses by him found going at large."

A horse was taken up by a minor son of a freeholder, without his previous knowledge or consent, but the act was afterwards fully ratified by the father, so far as it was capable of ratification, and the subsequent proceedings under the statute were conducted by the father in his own name.

The ruling of the court was, that the act of the son was a trespass, and could only be confirmed by the father as such, so as to make him originally liable as a trespasser. The reasoning is, that the restriction of the power to a certain class of persons was designed as a safeguard against its abuse and for the protection of the rights of the owners of these animals; that the power given must be strictly pursued, and that none of the safeguards thrown around its exercise can be disregarded.

The court say: "Other classes of persons might, as a general rule, be not only less able to respond for an abuse of the power, but less careful to inquire into the circumstances before exercising it; less discreet in making seizures, and more disposed to exercise the power under circumstances which would not call for its exercise, than freeholders, against whom the same power might be exercised by their neighbors.

"In this view of the statute, every owner is entitled, before his property shall be 'taken up,' to have the benefit of the knowledge and information of the freeholder, and to the exercise of his personal discretion and judgment upon the circumstances of the case, and his personal decision thereon. * * * The father had no right to substitute the information, judgment and dis-

cretion of the son for his own. The son was a mere trespasser, his act was illegal and void, and the subsequent ratification confirmed it only *as such* — as a void and illegal act, upon which no right to the property can be founded.”

The application of the above doctrine to this case would not only divest Hartman of any right of possession or claim to compensation, but would make him a trespasser from the beginning.

But we do not base our decision in this case upon either of the two points above mentioned. There is another point in the case that we consider fatal to the judgment below, which is, that soon after the seizure of these horses as estrays, they were put to work by Hartman, and used by him in his business, as livery horses, up to the day of trial, a period of about two years.

The excuse for this treatment, as given by said defendant, is that they had to be kept twelve months before they could be sold under the estray law, and being kept in the stable, they were put to work so as to make them earn their feed. That Hall, his co-defendant, purchased them at the sale, and after that they were used as his horses.

It is not pretended here that any title passed by virtue of this sale, but it is strongly contended that defendants are entitled to the possession of the horses until the costs, charges and fees prescribed by sections 2565 and 2566, G. L., are paid by the plaintiff, notwithstanding the fact that the sale was void.

This was the view taken by the district court, and in accordance with the instructions given on the trial, “the jury found the ownership in the plaintiff, and the right to possession in the defendants.”

This would be correct, if it could be said that the original taking up was lawful, and that there has been since, no abuse of the authority granted by the statute. It is well settled that a subsequent abuse of the authority will

relate back to the seizure, and render the whole proceeding void from the beginning. If the taking up was unlawful, or if it has subsequently become unlawful, the taker-up forfeits all claim to compensation, and cannot defend an action for possession of the property on this ground.

The rule is stated in Bacon's Abr. page 451, that: "When the law has given an authority, it seems reasonable that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make everything done void, and leave the abuser in the same situation as if he had done everything without authority."

Defendant Hartman says the horses were put to work so as to make them earn their feed; his counsel argue that they were gently exercised for the benefit of their health, while the livery stable men and drivers say they were driven to hacks, and worked the same as the other livery horses at the stable.

Defendants' counsel make the further point that the driving about publicly of estray horses is an advantage to the owner, in affording better opportunities for the discovery of the animals, when it is done fairly, and with no intention to deceive, as in this case.

It would be a sufficient answer to this proposition to say the law is otherwise; but as to the driving being an advantage to the owner in this case, we may add the fact is also otherwise.

One of these animals is a bay gelding, without brand or any distinguishing marks, except that the owner says he had a long, bushy tail when he went away.

The other animal is a sorrel mare, having white marks by which she could be easily identified. Now the manner of using them prior to the attempted sale was such as to render their identification difficult and improbable. The horses were not driven together, but with other animals, the horse being driven in the day-time, and the

mare in the night-time; when found by the owner, shortly after the sale, the horse had a short tail, and the owner swears that the bushy part of the tail was cut square off. The witnesses for the defense, however, swear that the hair was not cut off after he came to the stable, but that the horse may have worn it off somewhat, as horses usually do when driven to buggies or hacks. Admitting this to be so, the appearance of the horse would be changed, and, being driven in livery with a mate pretty closely resembling him in general appearance, it is doubtful whether the owner would have recognized him if he had seen him on the street.

The finding of the jury referred to by counsel, that Hartman acted in good faith in respect to the whole transaction, does not alter the facts of the case as they were shown to exist upon the trial. The question involved is not a question of good faith, but a question of law; and considering it as such, we cannot regard the using of these horses in the manner described by the witnesses, otherwise than as a gross abuse of the authority given by statute. Nor do we think that the supposed necessity, or the supposed benefits assigned therefor, afford any justification whatever.

The statute never contemplated the stabling and grain feeding of estray stock, as is evident not only from the expressions employed about *herding* and *ranching*, but from the rate of compensation allowed the taker-up. It provides that after filing a certain notice, it shall be lawful for the taker-up to "*herd and take charge of said stock.*" G. L. sec. 2565. The next section allows him fifty cents per month for "*ranching the said stock.*"

The argument that the continuous working of estray horses in livery, as in this case, may be justified on the ground of necessity, assigning as such necessity that the animals require exercise to preserve them from injury, or a necessity to cut down the expenses of keeping them; or to place it upon the ground of a benefit to the owner, as

affording better opportunities for recognition, is not only illusory and absurd, but is in contravention of legal principles.

The law from the earliest times has regarded the using of estrays, or distrained animals, as a tort, save only when the use was necessary to their preservation, as in the case of milk cows.

Blackstone says: "When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it has been held that the distrainer is not at liberty to work or use a distrained beast." 3 Black. Com. *13.

The case of *Oxley v. Watts*, 1 Term Reports, 12, cited by counsel for plaintiff in error, was an action of trespass for taking a horse, tried before Lord Mansfield. The defendant justified taking the horse as an estray. It seems that the original taking was admitted to be lawful, but the court held that the subsequent using made the defendant a trespasser *ab initio*.

In *Sackrider v. McDonald*, 10 Johns. R. 252, it was held to be such an abuse of the power of distraining animals *damage feasant*, to impound them before the damages were assessed, as to render the original seizure a trespass.

The opinion was delivered by Kent, C. J., who, in discussing the principle of carrying back an abuse of authority to the original taking, says: "This was the settled rule of the common law, and it has been constantly and uniformly acknowledged by the courts; and the distinction is between an entry, authority or license given to one by law and by the party.

"If the authority be abused, the law in the first case adjudges, by the subsequent act, *quo animo*, the original entry was made, and makes the party a trespasser *ab initio*, but not so in the latter case, because the party cannot, for any subsequent cause, punish that which was done by his own authority."

The case of *Barrett v. Lightfoot*, 1 Monroe, 241, was an action of trespass for illegally riding and killing a stray horse. The defense was that the defendant took up the animal as an estray, under the statute, and, previous to the ten days allowed by law to post him as such, caused him to be used, in a case of necessity, to send for a physician. Upon demurrer, the plea was held bad, and this ruling was sustained upon writ of error.

The question presented for decision was, conceding it to be in general illegal to use an estray before posting, whether this case, by reason of the necessity that existed for the use, formed an exception.

The court was not called upon to decide whether the rule was different after posting, but the reasoning of the court and the authorities cited make no distinction.

The first proposition announced is that, if Barrett acted under the authority of law in taking up the horse, any subsequent abuse of that authority makes him a trespasser *ab initio*.

Barrett relied upon a case in Croke James, 148, as authority for using the horse, from which case the court quote the following paragraph: "It is not lawful for any to use it in any manner, unless in case of necessity and for the benefit of the owner, as to milk milch kine, because otherwise they would be spoiled; and so of the like. But to use a stray horse by riding or drawing is tortious, although it were alleged that the common course is to use stray horses with withes about their necks."

Upon the above citation, the court comment thus: "It will at once be admitted that the case in Croke goes as well to establish the principle that strays cannot in the general be used, as that there may exist such a necessity for using them as to form an exception to the general principle, and render the use lawful." But to have that effect, the necessity must, we apprehend, be of a different sort to that which is alleged in the plea of Barrett.

The illustration made by the court in the case cited

shows the sense in which the expression, *necessity*, was intended by them, and proves conclusively that strays cannot lawfully be used by the taker-up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner. There being, therefore, no such necessity for using the horse by Barrett, alleged in his plea, the use was illegal, and an abuse of the authority of law, and as such the demurrer to the plea was correctly sustained.

The cases of *Nelson v. Merriam*, 4 Pick. 249, and *Adams v. Adams*, 13 Pick. 384, recognize the same doctrine of the foregoing authorities, and all are in accord with the ruling that the using of estrays, save as to the exceptions mentioned, is tortious, and that the taker-up forfeits his claim for compensation.

These views being in conflict with the theory upon which the cause was tried, and with the instructions of the court below, the judgment will be reversed and the cause remanded for further proceedings.

Reversed.

MORRELL V. FERRIER.

1. Whether the promise, its identity with the debt being assumed or established, is sufficient to take a case out of the bar of the statute of limitations, is a question of law for the court. Whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury.
2. As a general rule, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is on the defendant to show that it related to another debt either wholly or in part.

Error to District Court of Fremont County.

THE facts are stated in the opinion.

7	22
13	227
7	22
26	491
7	22
15a	51
15a	52
7	22
20a	348

Mr. JOHN D. FREEMAN and Messrs. STUART, for plaintiff in error.

Messrs. MACON and COX, for defendant in error.

STONE, J. Plaintiff brought suit, November 22, 1881, against the defendant upon a promissory note of which the following is a copy:

"\$2,500.

JANUARY 1, 1866.

"Three years after date we promise to pay to the order of Mrs. Anna Maria Morrell, twenty-five hundred dollars, at the office of Tweed & Sibley, No. 40 Walnut St., Cincinnati, value received.

SAM. T. FERRIER,

"GEO. E. FERRIER,

"THOMAS FERRIER."

The complaint averred that the note was given for money loaned by plaintiff to defendants; that there was a verbal agreement for interest at ten per cent. per annum from date until paid, and that the accruing interest thereon had been paid up to April 1, 1871.

Defendant pleaded, first, the general issue; second, that the cause of action accrued without the state; and third, the statute of limitations.

To the plea of the statute of limitations the plaintiff replied, setting up a new promise in writing which was contained in a letter from the defendant to the plaintiff, of which letter the following is a copy:

"DELPHI, IND., Nov. 24, 1876.

"*Mrs. A. M. Morrell, Cincinnati, Ohio:*

"I received a letter from you a few days ago about your money. I had written Uncle Tweed some time ago about it, and supposed he had written to you. I sold one of my farms some time ago and will have money coming in, in February, *when I expect to pay you all*. Until then I do not see how I can pay you, as times are very close here and money is hard to get. Our crops have not been good for two years, consequently I have but little to make money out of, until my notes come due.

"I am sorry I have not been able to pay your interest as it came due, but will pay you interest on what is unpaid, so as to make it all right.

"Please leave the note with Mr. Sibley and let him figure it all up, send me the amount, and, if nothing happens, I will send him draft for it in February.

"Very respect.,

"SAM. T. FERRIER."

The cause was submitted to the court for trial without the intervention of a jury, upon the pleadings, the note, and the letter, without other evidence; and upon consideration thereof, the court found for the defendant and rendered judgment accordingly.

The only question for us to consider is the sufficiency of this letter as evidence tending to prove the new promise relied upon, to take the case out of the bar of the statute of limitations.

The letter contains an unequivocal acknowledgment of an indebtedness from defendant to plaintiff, and a clearly implied promise to pay. As to its reference to the particular indebtedness evidenced by the promissory note in suit, we think this is sufficiently indicated *prima facie*. The note is made payable at the office of "Tweed & Sibley," and the defendant in his letter refers to "Uncle Tweed" in connection with this indebtedness, and also refers to "Mr. Sibley," requesting the plaintiff "to leave the note with Mr. Sibley and let him figure it all up, send me the amount, and, if nothing happens, I will send him draft for it in February." The sentence preceding the foregoing refers to the interest, which defendant regrets not having paid in full, but promises to pay; and the figuring which he requests Mr. Sibley to do, evidently refers to computing the interest, so as to ascertain the amount of principal and interest due on the note which is made payable at Tweed & Sibley's, and for which defendant promises to send a draft to Mr. Sibley.

Whether the promise, its identity with the debt being

assumed or established, is sufficient to take the case out of the bar of the statute, is a question of law for the court; whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury. *Whitney v. Bigelow*, 4 Pick. 110.

In *Martin v. Broach*, 6 Ga. 21, it was held that where there is no dispute as to the facts which go to prove the acknowledgment or new promise, the question is one of law for the court; but where there is any dispute, the question is a mixed one of law and fact for the jury.

Moreover it is laid down as a general rule, that where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is upon the defendant to show that it related to another debt, either wholly or in part. Wood on Limitation of Actions, p. 162; Angell on Lim. of Actions, sec. 238; 2 Greenleaf Ev. sec. 441; *Carr's Adm'r v. Hurlbut's Adm'x*, 41 Mo. 264; *Whitney v. Bigelow*, 4 Pick. 119; *Cook v. Martin*, 29 Conn. 63.

If this rule be a sound one in general application, it certainly would apply with peculiar force in a case where but one item of indebtedness is in suit, and where one matter of indebtedness only is referred to in the acknowledgment or new promise.

But we regard it as scarcely necessary to invoke the aid of this rule in the present case; the facts appear undisputed; this letter of defendant to plaintiff appears to fairly establish identity between the indebtedness it refers to, and the note in suit, while the acknowledgment of the indebtedness, and the new promise to pay the same, are certainly sufficient in law to overcome the plea in bar.

We therefore think that, upon the pleadings and evidence before the court, the finding and judgment should have been for the plaintiff.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

7	24
38	393

WELLS ET AL. V. ADAMS.

1. When an attorney takes a case upon a contingent fee, and on his own account employs an attorney to assist him in the case, upon promise of a "good fee" for the services he shall render, it is error, upon the trial of an action for such service, to admit testimony showing the amount realized by the attorney whose compensation rested on the contingency.
2. The value of an attorney's services in a given case is to some extent governed by the amount in controversy, and the consequent responsibility resting on him, and it is not error to admit evidence of the value of the property in controversy.
3. It is error to allow an answer to a hypothetical question which does not conform to the facts in evidence.
4. The statements of a person not a party to the record must be rejected as hearsay. Secondary evidence of the contents of a letter should not be admitted, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found.

Appeal from District Court of Custer County.

THE facts are stated in the opinion.

Messrs. WELLS, SMITH and MACON *pro se*.

Mr. G. S. ADAMS *pro se*.

HELM, J. Appellants are, and were in May, 1879, co-partners in the practice of the law. The firm was at that time engaged in prosecuting a certain cause known as the Bull-Domingo suit, then pending in the district court of Custer county. Macon, one of the partners, being on the ground in charge of the case in behalf of himself and copartners, employed appellee (a local attorney at law) to assist in the trial thereof, promising him a "good fee" for his services in connection therewith. The cause was tried, occupying some ten or twelve days, and appellee assisted as counsel therein. Failing to secure such compensation as he deemed his services worth, appellee brought suit and obtained a verdict and judgment

against appellants for the sum of \$2,500. Neither of appellants was present at this trial, though they were represented by counsel; no evidence was offered in their behalf, and the verdict was based exclusively upon the testimony introduced by appellee.

It appears that appellants took charge of the Bull-Domingo case for a contingent fee, and were to furnish all of the legal services necessary in the management thereof, and appellee and one Hunter were permitted to testify that appellants received \$42,500 for the services rendered. In determining the value of appellee's labor, the jury doubtless took into consideration the amount of this fee, and were governed to some extent thereby.

There was no contingency as to appellee's compensation for his services. Appellants were bound, if at all, to pay him a good fee, whether they received anything or not. His compensation did not depend in any way upon success in the case; theirs rested entirely on this contingency. He was to be well paid for the services actually rendered; they might bear most of the responsibility and perform most of the work, and yet receive no remuneration whatever therefor. Had appellants been unsuccessful in that cause and received nothing for their labor and responsibility, they could not have reduced the amount of appellee's recovery by proving that fact in this case.

The value of an attorney's services in a given case is to some extent governed by the amount in controversy, and the consequent responsibility resting upon him. A larger fee is usually charged and received for the management of a cause involving \$50,000, than for similar services in a controversy over \$50. And we are not disposed to say that the court erred in admitting proofs showing the value of the property at stake in the Bull-Domingo suit, though appellee was only assistant counsel therein, and bore but a small part of the responsibility. But we cannot, by any satisfactory reasoning, extend

this rule so as to sanction the court's action in admitting proof as to the fee received by appellants.

The court also erred in allowing the witness Moorman to answer the hypothetical question put to him. Moorman, who was a practicing attorney, was called for the purpose of giving his opinion as to the value of the services rendered by appellee. The question put to him supposed that the party occupying the position of appellants received \$42,500 for services rendered, and it also contained a supposition that appellee was engaged fifteen or twenty days in the preparation and trial of the case; whereas his own testimony limits the time to ten or twelve days. It is only reasonable to infer that Moorman considered these elements of the question, and in consequence thereof placed his estimate of the value of the appellee's services higher than he otherwise would.

Witness Hunter was permitted to testify to declarations made by one Wilson, concerning the employment of appellee by Macon. Wilson was not a party to the record, and had no connection with the controversy; his declarations were purely hearsay, and should not have been admitted.

Appellee, while testifying, stated the contents of a letter received from appellant Wells. The only evidence as to the loss of this letter is given by him as follows: Question.—“Have you got that letter?” Answer.—“I have not. I have hunted my office over for it.” Question.—“Have you made diligent search for that letter?” Answer.—“I have.”

The proof of diligence used in searching for a lost instrument, required as a foundation for the admission of oral evidence concerning the contents thereof, depends to some extent upon the nature of the instrument lost. 2 Best on Evidence, § 482.

The contents of a letter, or the superscription upon an envelope, which is not likely ever to become useful, might

be shown by parol upon more slender proof of loss than would be required in the case of an important contract.

But such secondary evidence as to the contents of any document should not be admitted, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found, if the circumstances admit of such proof. 1 Wharton's Evidence, § 147.

The declaration of appellee that he had made diligent search in his office for the letter is not a compliance with the foregoing requirements; the court erred in admitting secondary evidence of its contents.

According to the averments of the complaint and the testimony of appellee himself, he was only employed by Macon to assist in the trial of a suit then pending; yet he was permitted to testify as to services rendered, including a trip from Rosita to Pueblo in a subsequent suit between the same litigants. These services and expenses were included by the jury in estimating the amount of his damages. There was error in admitting this testimony, but as no exception was preserved thereto, we are precluded from considering the same.

For errors, however, in the admission of testimony to which exceptions were duly taken, the cause must be reversed. While some of these errors would perhaps not be sufficient in themselves alone to justify a reversal, yet others were important, and, taken together, we are satisfied that appellants were seriously prejudiced thereby, and should be awarded a new trial.

Reversed.

BROWN ET AL. V. TUCKER.

7	30
8	609
11	101
7	30
19	114
7	30
15	306
7	30
12a	174
12a	175
7	30
17a	168
7	30
19a	133
19a	134
7	30
28	404

1. A rule applicable to every system of pleading is that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. Objections are not waived to an answer by filing a demurrer to a replication.
2. Where service by publication is relied upon, it must be in a case and under circumstances wherein that mode of acquiring jurisdiction is authorized by the statute, and the material requirements of the statute must be complied with.
3. Where service is obtained by publication of the summons, the defendant has forty days to answer the complaint after the service is complete.
4. In an action of attachment under the statute, if the district court has complied with the terms of the statute in respect to obtaining jurisdiction of the person and the subject-matter and in pronouncing its judgment, no authority exists for disregarding or refusing to give effect to such judgment in a collateral proceeding.
5. The levy of a writ of attachment issuing out of a district court being followed by judgment, and execution having issued within a reasonable time, *held*, that the plaintiff's lien upon the attached property was preserved as against a special execution issuing out of a county court on a junior judgment in favor of another party; also *held*, that an objection that a general, instead of a special, execution was issued against the attached property would be unavailing.

Error to District Court of Lake County.

THE facts are stated in the opinion.

Messrs. DECKER and YONLEY, for plaintiff in error.

- Messrs. MARKHAM, PATTERSON and THOMAS, for defendants in error.

BECK, C. J. The questions presented by this record arise upon the pleadings, and involve the sufficiency of the answer and replication. A demurrer to the answer was overruled by the court below, and a demurrer to the replication sustained.

The foundation of the action is a judgment of the district court of Arapahoe county, in favor of Brown &

Brother, plaintiffs in error, against one A. H. Collins, which judgment is alleged to have perfected a lien in favor of said plaintiffs upon a stock of goods owned by the defendant Collins.

Tucker, the defendant in error, and who was also defendant below, was sheriff of Lake county, and as such officer seized the goods upon a writ of attachment issued by the district court of Arapahoe county, in the case of Brown & Brother against Collins, and duly levied said writ thereon. After judgment in the latter action, Tucker sold the goods upon a special execution issued from the county court of Arapahoe county, and to him directed as sheriff of Lake county, upon a junior judgment rendered by said county court in favor of the German National Bank of Denver against said Collins.

Subsequently he returned an execution, afterwards issued upon the judgment of Brown & Bro., *nulla bona*.

The defense set up by Tucker in his answer to the complaint in the present action is, substantially, that the judgment in favor of Brown & Bro. is void, because it is a judgment *in personam*, rendered upon constructive service only, and also because it was entered prematurely.

The defendant likewise justifies under the special execution in favor of the German National Bank of Denver.

So far as the replication is concerned, we have only to say that it is certainly a remarkable pleading, and, in our opinion, fully warrants the criticism passed upon it by counsel for defendant in error, who say: "The demurrer (to the answer) was argued at length and overruled, upon which our learned friends reduced their argument of the demurrer to writing, filed it in the cause and called it a replication."

The replication is clearly bad, but we cannot agree with defendants' counsel that this conclusion terminates our investigation, and that nothing remains but to affirm the judgment of the court below.

The errors assigned are: First, the sustaining of the

demurrer to the replication; second, giving judgment upon said demurrer for the defendant in error, when, upon the whole record, judgment thereon should have been for the plaintiff in error.

A rule applicable to every system of pleading is that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. The objections to the answer, therefore, are not waived, as supposed, by the fact that a replication thereto has been filed since a demurrer was subsequently filed to the replication. On the contrary, the sufficiency in law of the answer was legitimately raised by the filing of the last mentioned demurrer. We will therefore proceed to test the sufficiency of the answer. This involves an inquiry as to the validity of the judgment of Brown & Brother against Collins, the answer alleging fatal irregularities to have occurred in the entry of said judgment.

The objection that the judgment was prematurely entered is based upon the facts that the only service of process upon Collins was by the publication of the summons, the first publication of which was on the 7th of September, 1880, and the last publication thereof on the 6th of October, 1880, and that judgment by default was rendered against him on the 18th day of October, 1880, or twelve days after the last publication.

That the service by publication was complete, and that the district court acquired jurisdiction of the cause before the entry of the judgment, is expressly declared by statute. When personal service cannot be made upon a defendant, section 42 of the code requires the summons to be published in a public newspaper at least once a week for four successive weeks. The section concludes thus: "And in case of publication, the service of summons shall be deemed complete at the expiration of ten days after the expiration of the time prescribed for publication."

Section 46 provides that, "from the time of the service

of the summons in a civil action, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings."

No distinction is made, by this section, as to the manner of service of the summons upon the defendant, and the language necessarily includes service in either of the ways provided by the preceding sections.

Where service by publication is relied upon, it must be in a case and under circumstances wherein that mode of acquiring jurisdiction is authorized by the statute, and the material requirements of the statute must be strictly complied with.

A point is made by counsel for defendant in error, that a copy of the summons was not deposited in the post-office by the clerk of the district court, directed to Collins at his place of residence, as required by section 42.

We cannot consider this point, for the reason that it does not properly arise in the case. The section only requires a copy of the summons to be so deposited, "where the residence of a non-resident or absent defendant is known." The answer does not allege that the residence of Collins was known, nor does it raise the objection that a copy of the summons was not deposited in the postoffice.

So far, then, as the objections stated in the answer are concerned, there was a literal compliance with the requirements of the statute, in respect to the service of the summons, and, in the language of section 46, the court must be deemed to have acquired jurisdiction, and to have had control of all subsequent proceedings.

But notwithstanding the foregoing conclusion, the judgment against Collins was prematurely entered. We have held in two cases that where service is obtained by publication of the summons, the defendant has forty days to answer the complaint after the service is complete. *Conley v. Morris*, 5 Col. 212; *Skiles et al. v. Baker*, id. 295.

This is a question of statutory construction, and was passed upon by the district court, as appears from the recital in the judgment that "the legal time for answering having expired," etc.

In the decision of this point the court erred, and in a direct proceeding to review the judgment, it would have to be reversed for error. But the judgment is collaterally drawn into question here, and a different rule obtains, which is, that unless it is absolutely void, the error complained of is not available in this proceeding.

The decided weight of authority is to the effect that when jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are exercise of jurisdiction, and however erroneous, they are not void, but voidable only, and not subject to collateral attack. Freeman on Judgments, secs. 126, 135, 142, and notes; *Cooper v. Reynolds*, 10 Wall. 315.

Counsel for defendant in error take the position that the judgment is void upon another ground, viz.:

"Because it purports to be a personal judgment, rendered upon publication of process, and that the mere fact that property was attached, under our statute, cannot impart any vitality to it for any purpose whatever."

The opinion of the supreme court of the United States in *Pennoyer v. Neff*, 5 Otto, 714, is cited and relied upon by counsel to sustain this position.

In our judgment it not only fails to sustain the position assumed, but shows clearly that the law is otherwise.

It is true the court held that the judgment brought under consideration in that case was void, but there is a marked distinction between the proceedings in that case and the proceeding in the case which we are now considering.

That was the case of a judgment recovered in one of the state courts of Oregon against a non-resident defendant. The action was upon a money demand, the service

by publication, no attachment was sued out, nor any attempt made to reach or discover property of the debtor until after judgment. Then an execution was issued and levied upon real estate of the judgment debtor, which was afterwards sold to satisfy the judgment. It was the case of a purely personal action against a non-resident of the state, not in any manner partaking of the nature of an action *in rem*, the recovery of a personal judgment upon constructive service of process, and the subsequent attempt to subject property to the satisfaction of the judgment.

The ruling of the supreme court is that it is essential to the jurisdiction of a state court, in such a case, that the debtor have property within the state that can be applied in satisfaction of his indebtedness. Otherwise the judgment is void.

The position was assumed by counsel, in that case, that where a non-resident debtor has property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner, or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution.

The court say the contrary of this proposition is the law; that the jurisdiction in such case depends upon the question whether the defendant has property within the state that can be applied to the satisfaction of the demand sued for, and that it is essential to the jurisdiction of the court, not only that this fact be made to appear, but that the property be brought under the control of the court before judgment; that the question of jurisdiction cannot be made to depend upon facts to be ascertained after the cause has been tried and judgment rendered; the judgment cannot occupy the doubtful position of being valid if property be found, and void if there be none.

In the case now under consideration an attachment was sued out after the institution of the suit, and levied upon a stock of goods belonging to Collins, the absent debtor, after which the action proceeded to judgment. In respect to a case of this nature, the supreme court, in the foregoing opinion, cite with approval the opinion of Mr. Justice Miller in *Cooper v. Reynolds*, 10 Wall., 315, saying, "in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them."

The judgment collaterally assailed in the latter case was one obtained in an action of trespass in the county court of Knox county, Tennessee.

On the day the suit was instituted, and after the summons was issued, the plaintiff filed an affidavit for an attachment in aid of his suit, alleging therein that the defendants had fled from the state, or so absconded or concealed themselves that the ordinary process of law could not reach them. An attachment issued and was levied upon land of one of the defendants, situated in the same county. The summons was returned "not found," and publication was ordered to be made as required by statute in such cases. Defendants failed to appear at the trial, and judgment by default was rendered against them for the sum of \$25,000, the damages claimed by plaintiff, the land attached was ordered to be sold, and was afterwards sold in satisfaction of the judgment.

The statute of Tennessee authorizes an attachment in aid of a suit at law, either before or after judgment, when the debtor is about to remove or has removed from the state, or where he absconds or conceals himself or property.

It was held that the validity of this judgment could not be collaterally questioned, the errors assigned not affecting the jurisdiction of the court that rendered it. That in this class of cases the levy of the writ of attach-

ment is the essential requisite of jurisdiction, as in proceedings purely *in rem*, and that unless property is found on which to levy the attachment, the court is deprived of jurisdiction and can proceed no further.

The proceeding is spoken of as a statutory one, of a complex character, and as partaking of the nature of a proceeding *in rem*, the effect of which is to subject the property attached to the payment of the demand which may be found to be due the plaintiff. The judgment to be rendered in such proceeding is spoken of as being in form a personal judgment against the defendant.

After referring to the statutory provisions concerning the issue and levy of the attachment, and the publication warning the defendant to appear, etc., Mr. Justice Miller continues: "If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff."

The judgment of the Knox county court was sustained in the above case, and we are of opinion that if the judgment of the Arapahoe county district court be tested by the same principles announced in the foregoing decisions, it must be held valid in this collateral proceeding.

The main feature that distinguishes this case from that of *Cooper v. Reynolds*, *supra*, so far as the objections under consideration are concerned, is that in the latter case the court ordered the attached property to be sold in satisfaction of the judgment, whereas, in the case before us, no such order was made, but an ordinary judgment *in personam* was entered.

It must be borne in mind that this is a statutory proceeding. If the district court has complied with the terms of the statute in respect to obtaining jurisdiction of the person and the subject-matter, and in pronouncing its judgment, no authority exists for disregarding or refusing to give effect to that judgment in a collateral proceeding.

Section 91 of the Civil Code authorizes the plaintiff, at the time of commencing an action on contract, express or implied, or at any time before judgment, where ground for attachment exists, to have the property of the defendant, not exempt from execution, attached as security for any judgment that may be recovered in such action.

Section 95 permits the defendant, by an affidavit, to traverse and put in issue the matters alleged in the affidavit on which the attachment is based.

In the absence of such traverse, or of any application to quash the writ or to discharge the attachment, the statute does not require an investigation of the truth of the allegations of the affidavit, or that the court shall make any finding or order concerning either the attachment or the property attached. These matters are merely incidental to the action, and there being no issue as to them, the court does not appear to have any duty appertaining thereto to perform.

The statute itself fixes the *status* of the attached property and gives full directions as to its custody and disposition.

Section 105 requires the sheriff to retain the property attached to answer any judgment that may be recovered in the action, with two *provisos*; one is, if the attached property be perishable, he is required to sell it and retain the proceeds for the above purpose; the other is, that, before judgment is obtained, the attached property or its proceeds may be subjected to execution upon another judgment recovered previous to the issuing of the attachment.

After judgment for the plaintiff the sheriff is required,

by the express terms of section 107, not by the order of the court, to enforce the attachment lien by a sale of the property attached, unless it has been released as provided by law, or subjected to execution on another judgment recovered previous to the issuing of the attachment.

The objection to the judgment, that it contains no order as to the application of the attached property, does not appear to be well taken. The decisions cited upon this point, based upon other systems of practice, and upon dissimilar statutes, cannot control. And if the rule of decision adopted by the supreme court of the United States, in respect to proceedings *quasi in rem* against non-residents, be admitted, viz.: that only the property seized before judgment can be applied in satisfaction of the judgment, still, under our statute, the failure to make such order cannot be held fatal to the judgment in this class of cases. No mention of the attachment being made in the pleadings, no issue being tendered concerning it, and no prayer contained in the complaint as to the application of the attached property, any order of the court respecting it would be outside the allegations of the complaint and of the issues.

In addition are the considerations that the statute requires no such order, but has vested full authority, and cast all responsibility concerning the custody and proper application of the attached property, upon the officer of the court.

These views are sustained by the following adjudications upon a similar statute: *Low v. Henry*, 9 Cal. 551; *Myers v. Mott*, 29 Cal. 364; *Gregory v. Nelson*, 41 Cal. 282.

The levy of the writ of attachment in this case being followed by judgment, and execution having issued within what was held in *Speelman v. Chaffee*, 5 Col. 247, to be a reasonable time, the plaintiff's lien upon the attached property was preserved by the statute as against the special execution issued out of the county court upon

the junior judgment rendered therein in favor of the German National Bank.

We are aware that there has been a slight modification of the statute under which the question of reasonable time for the issue of an execution arose in the above cited case, but the same reasons therein mentioned still exist for adhering to the rule there announced.

The objection that a general execution was issued upon the judgment of plaintiffs in error, instead of a special execution against the property attached, is equally unavailing. The execution follows the judgment, and, under it, the defendant in error, as sheriff of Lake county, was fully warranted in subjecting the attached property to sale in satisfaction of the judgment.

As a result of the foregoing conclusions, we must hold that the answer filed by the defendant in error to the complaint in this cause is insufficient to constitute a defense to the action. The demurrer to the replication, therefore, should have been carried back and sustained to the answer.

We have not considered in the foregoing opinion, and do not decide upon, the effect of the provisions of our statute concerning constructive service of process, where property of an absent defendant is not seized pending the action, or where the property seized is insufficient to satisfy the judgment subsequently rendered. The judgment is reversed and the cause remanded.

Reversed.

7	40
10	266
7	40
13	474

O'CONNELL V. GAVETT.

1. Under the code (1877, secs. 431, 442), a judge who, before he went upon the bench, was of counsel in a case, is disqualified from presiding at the trial unless all parties consent that he may. And in such case it is his imperative duty (if county judge), of his own motion or on suggestion, to certify the case to the district court, without requiring petition for change of venue under the statute.

2. In the absence of any statutory provision, the general rule is that costs abide the event of the suit, and in case of a change of venue from the county court, on the ground of the disqualification of the judge, there is no authority to make the payment of costs a condition precedent to such change of venue.

Appeal from County Court of Pitkin County.

THE facts are stated in the opinion.

MR. T. A. RUCKER and MR. B. E. SHEAR, for appellant.
No one appearing for appellee.

STONE, J. From the record and bill of exceptions brought up, it appears that suit was brought by appellee against appellants in a justice court, and from the judgment rendered therein the defendants appealed to the county court, where the case was again tried, resulting in a verdict against defendants, and upon their motion a new trial was granted. Before the second trial came on a new county judge was elected in the person of J. H. King, Esq., who had acted as counsel for defendants at the former trial, and who was now presiding as judge of the county court, when the case came on for the new trial granted. Whereupon, when the case was called up, defendants moved the court to certify the case up to the district court, in accordance with the statute, on account of the disqualification of the judge, by reason of his having been of counsel in the cause. The plaintiff waived objection and consented to trial in the county court, but the defendants refused to consent, whereupon the court offered to allow the motion, on condition that defendants pay all the costs which had accrued in the former trials of the case. The defendants refused to comply with the condition, and thereupon the court set the case down for hearing. Defendants then prayed a change of venue to the district court, setting up by affidavit the disqualification of the county judge, as in the former motion. The court consented to grant the

change on the condition only as before, that defendants pay the accrued costs, and upon the refusal of defendants to comply with this condition, the court proceeded to the trial of the case, and rendition of judgment therein. Defendants duly excepted and appealed to this court, and the only grounds of error presented are, first, the disqualification of the judge to try the case; and second, the refusal of the court to certify the case to the district court except upon the condition named.

The ground of disqualification rests upon the provisions of section 431 of the code, which reads as follows:

“A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all the parties to the action.”

The judge, having been of counsel for the defendants in the previous trial of the action, was, under this statute, clearly disqualified from acting as judge in the trial of the case, and the disqualification not having been waived by consent of the defendants, had no authority to act judicially therein.

Section 442 of the code is as follows: “If the county judge be disqualified for any cause from sitting on the determination of any action or proceeding pending before him, the cause shall be certified, with the original papers, to the district court of the same county, which shall proceed thereon to final determination and judgment.”

In accordance with this provision, it was the duty of the judge to certify the case up to the district court for further proceedings upon his own motion, or upon the suggestion merely or motion of the party not desiring to waive the disqualification, without requiring such party to petition for a change of venue under the provisions of the chapter relating to change of venue. The provisions

of section 442, quoted above, are special in relation to judges of county courts, and, when not waived by all the parties to the action, are imperative.

As to the second ground of error, respecting the accrued costs, we think there was no authority for imposing the condition of payment, for there was no law imposing such condition. Under the law as it stood before the adoption of the code, the expenses of a change of venue, in courts other than justices of the peace, were not to be taxed as part of the costs, but were to be paid by the party procuring the change of venue. The code repealed all former laws upon this subject, and none relating to costs upon a change of venue has been subsequently enacted. In the absence, therefore, of any statutory provision upon the subject, the general rule that costs abide the event of the suit must apply. *Sudam v. Swart*, 20 Johns. 475.

In this case there was no apparent reason, outside of statutory law, for requiring the condition imposed, since the appellants, in appealing the case to the county court, had given the required appeal bond, which was ample security for all costs which should be adjudged against them.

For these reasons, we must hold that the trial and judgment in the court below were void, and the judgment will accordingly be reversed, and the case remanded for further proceedings according to law.

Reversed.

THE OVERLAND MAIL AND EXPRESS CO. V. CARROLL.

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1. In the absence of special contract, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy.
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2. But it is held that, upon grounds of public policy, they cannot, even by contract, shield themselves from responsibility from loss or injury, nor limit the amount to less than the value of the loss, by the negligence of themselves, their agents, employees or servants.
3. It being the custom to require valuable packages to be sealed before receiving for shipment, it is negligence to receive an unsealed package, or to ship it unsealed. Nor can the company, so in default, be excused by the fact that the loss may have occurred on one of the subsequent connecting lines.
4. The terms of the contract limiting liability, being for the benefit of the company, must be construed most strongly against it. A contract undertaking to limit the liability to that of a mere forwarder does not relieve the company from the exercise of ordinary care while the goods are in its possession.
5. If conflicting and irreconcilable propositions of law are contained in the charge, and it appears that the jury may have been misled thereby, a new trial should be granted; but if, upon a careful consideration of the entire charge, though there be conflict between some portions thereof, it appears that the complaining party could not have been prejudiced by it, the supreme court will not disturb the verdict on account of imperfections therein.

Appeal from District Court of Hinsdale County.

THE facts are stated in the opinion.

Mr. G. Q. RICHMOND, for appellant.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellee.

HELM, J. In December, 1880, Carroll, plaintiff in the court below, delivered to defendant's agent at Lake City a package, properly addressed, to be carried by express to the city of Dubuque, in the state of Iowa; he deposited the sum of \$3 to cover charges for the entire transfer, and received the following receipt, which was upon a printed blank, with the spaces properly filled in writing:

“OVERLAND MAIL AND EXPRESS COMPANY,

“LAKE CITY, December 17, 1880.

“Received of P. J. Carroll a box said to contain a gold watch and chain, valued at \$50, and marked, ‘Miss

Mollie Carroll, Dubuque, Iowa,' which we undertake to forward to the nearest point of destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that the said Overland Mail and Express Company are not to be held liable for any loss or damage except as forwarders only; nor for any loss or damage of any box, package or thing for over fifty dollars, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God or of Indians, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections or pirates, or from any of the dangers incident to a time of war; nor upon any fragile fabric, unless so marked upon the package containing the same; nor upon fabrics consisting of, or contained in, glass. Three dollars deposited to prepay charges.

"J. L. SANDERSON & Co., Proprietors.

"By E. H. SMITH, Agent."

At the time of delivering the package as aforesaid, the plaintiff informed defendant's agent that it contained a gold watch and chain, which were worth \$150; whereupon the agent advised him that the company would not be responsible in connection therewith for more than \$50. The articles were inclosed in a small wooden box, neatly made, with the cover securely fastened by screws, the whole weighing about two and a half pounds. Plaintiff requested the agent to seal the box, and the agent agreed to do so; he did not, however, and when its destination was reached, the contents were missing; the cover was held on with screws as when shipped, but the box contained only rolls or wads of paper.

Upon being informed by plaintiff of the theft, the agent exclaimed, "By George! I forgot to seal the box; I ought to have sealed it." And to another witness he said, substantially, "I wish I had sealed the package; it might be some assistance to us to find out the locality where the watch was extracted from the box."

The box was duly delivered by defendant at Alamosa, the terminus of its line, to the Denver & Rio Grande Express Company for further transportation, but was not then opened or examined. Upon this state of facts plaintiff brought his suit, and recovered a verdict and judgment for \$135 in the court below. Defendant prosecutes this appeal therefrom.

In the absence of special contract with the shipper, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods properly packed, when intrusted to them for transportation, against loss or injury, except it be occasioned by the act of God or the public enemy. And it is now the settled doctrine, that they may, at the same time, be subject to liability both as carriers and forwarders. That is, "they will always be held responsible as common carriers to the extent of the transportation upon their own line, and beyond that they are responsible as forwarders." Their responsibility in the latter capacity is in some respects greater than that of other common carriers in the ordinary course of business between connecting lines. See 2 Redfield's Railway Cases, note on p. 81, and cases cited.

This liability may, however, be limited by special contract with the consignor. But it is held, on the ground of public policy, that they cannot even by contract shield themselves from responsibility for loss or injury occasioned by the negligence of themselves, their employees or servants. *York Company v. Central Railroad*, 3 Wallace, 107; Field on the Law of Damages, § 394, and cases; 2 Redfield on Railways, p. 31 (5th ed.).

Appellant undertook to limit its liability by contract, in accordance with the foregoing doctrine. The receipt given Carroll upon delivery of the package is supposed to evidence the terms of this agreement. It is the usual method of making such contracts, and is sufficient, so far

as the form is concerned, for the purpose designed. Upon accepting, without objection or protest, such an instrument with knowledge of its contents, the shipper ratifies and is bound by all the conditions thereof, except those as to which no kind of a contract would, under the circumstances, be binding upon him.

The cause was tried to a jury, and the question of negligence was fairly submitted to them. Upon the subject of sealing packages, Smith, the agent who received the box, testified as follows:

“Question.—Have you an institution to seal packages in your office? Answer.—Yes, sir. Q.—Is it the custom of the office to seal packages? A.—I don’t know that it is. It is more the custom to have other parties seal their packages before we receive them. Q.—Why did you say to Mr. Carroll that you forgot to seal the package? A.—It would have been better if I had said I forgot to have him seal it. It is the custom of nearly all common carriers not to receive valuable packages unless sealed. I ought not, perhaps, to have received the package until it was sealed, although it was very nicely put together, and I never dreamed that anybody was carrying a screw-driver. Q.—This sealing business is done mainly for the purpose of tracing packages, if the contents have been disturbed? A.—Yes, sir. Q.—Is it, then, always the custom to seal a package, if it appears to be packed in such a manner as to accomplish this end? A.—No. Q.—Is the rule universal with regard to sealing? A.—No; we are guided by the appearance of the package.”

Witness Flynn, having had eighteen years’ experience in the express business, also testified:

“Question.—If you are so familiar with the customs of such companies, state what the custom is, if any, as to sealing express packages upon sending, and the purpose of such custom, and how general among express companies. Answer.—The packages must be properly sealed before shipment. I mean valuable packages. The

purpose is for security. The custom is general of sealing packages sent by express."

From the foregoing testimony, coupled with the promise of Smith at the time he received the box, and his language upon hearing of the loss of its contents, the jury evidently arrived at the following conclusion, viz.: That Smith was guilty of negligence in not sealing the package, and that it was the custom of express companies to seal valuable packages themselves, or it was their custom not to receive them until sealed by the owner. We would certainly not feel warranted in disturbing either of these findings upon the evidence before us. But they establish the liability of appellant. If it be the custom of express companies to seal such packages themselves, appellant is liable for its servant's negligence in not sealing. If, as the agent himself contends, the custom is not to receive them until sealed by the shipper, the company is responsible for his negligence in receiving the box unsealed, and afterwards shipping it in the same condition.

Appellant cannot be excused on the ground that the loss may have occurred on one of the subsequent connecting lines. This may be true. For aught that appears in the testimony, the contents may have been extracted after the box was transferred to the Denver & Rio Grande Express Company at Alamosa. Yet it was a valuable package, and should have been sealed. The loss arises from the negligence of appellant's agent in not sealing, and for the result of such negligence it is responsible.

Appellant could not make a binding contract with the owner, whereby it should be released from *all* liability in case of loss through its negligence. Upon the same principle it could not make a binding contract with him, limiting its liability for loss occasioned by its negligence to \$50, or to any other sum short of the actual value of the goods shipped, provided, of course, that it had notice of such actual value when it received them. The evidence

shows the watch and chain to have been worth \$135, and the jury were justified in returning a verdict for that amount. See *Southern Express Co. v. Moore*, 39 Miss. 822; 2 Redfield's Am. Railway Cases, p. 86.

If conflicting and irreconcilable propositions of law are contained in the court's charge, and it appears that the jury may have been misled thereby to appellant's prejudice, a new trial should be granted.

In this case, the charge is by no means a model one; there is some conflict between certain of the instructions given on behalf of the respective parties. But upon a careful and thorough consideration of the entire charge, we are satisfied that appellant could not have been prejudiced by such conflicts, and that we would not be warranted in granting a new trial by reason of imperfections therein. The law giving common carriers a right to limit their liability by contract, except in case of negligence, was correctly stated by the instructions for plaintiff. Those for defendant omit the qualification on the subject of negligence. If the jury was in any way misled by this portion of the charge, it must have been in the company's favor, and the error constitutes, therefore, no ground for reversal.

Appellant endeavored to restrict its liability by declaring in the contract that it should "not be held liable for any loss or damage, except as forwarders only." This, like all other portions of the contract incorporated for its benefit, must be construed most strongly against the company. Appellee, when he accepted the receipt, probably had no conception of the meaning of this limitation. But supposing that he is estopped from asserting his ignorance, still appellant is not relieved from responsibility.

Technically, it could not be a mere forwarder while the goods were in transit on its own line; the contract itself shows that the company was to transport the package from Lake City to some other point; for it provides for

delivering the same "at the nearest point of destination reached by this company." Appellant was, under the contract, not merely to receive and forward the box by some carrier, having no interest in the freight, and no expense or responsibility in the transportation. It would be no strained or unnatural interpretation of the contract to say that the intention was to limit defendant's liability to that of a forwarder from the *terminus of its line*, leaving its responsibility that of a common carrier, with the other restrictions imposed by the contract, while the goods were in transit thereto.

But we may construe the contract to be that, while acting as a carrier over its own line, it should only be liable as a forwarder; and we may suppose the contract to have been understood by the shipper and binding upon him. Yet, in the capacity of forwarder, appellant was held to the exercise of ordinary care; it was responsible for the negligence of its agents while the package remained in its possession. And while itself acting as a carrier in transporting the goods, although relieved from liability, save only as a forwarder, it must see that reasonable skill, prudence and industry are used in protecting and preserving the same.

The law is that a restriction like the one under consideration does not relieve the express company from liability for loss occasioned by the negligence of an employee on a steamboat or other conveyance, owned and conducted by some third party, but ordinarily used by the company in its business as a means of transportation. Certainly the restriction cannot relieve it from responsibility, where, as in this case, such loss results from the negligence of its own employee. See, on this subject, *Hooper v. Wells, Fargo & Co.* 27 Cal. 11; also note in 2 Redfield's Am. Railway Cases, 261.

Under this view of the law it cannot be that appellant was prejudiced by the fourth instruction given for appellee. The judgment of the court below must be affirmed.

Affirmed.

THE GLASS-PENDERY CONSOLIDATED MINING COMPANY v.
THE MEYER MINING COMPANY.

1. The well-settled rule of law relating to all irregularities in the proceedings of arbitrators, which are not jurisdictional, is that an objection, to be availing, must be seasonably made. If a party, knowing of an irregularity, in order to avail himself of all chances of an award in his favor, remains silent, and permits the investigation to proceed, and money to be expended, etc., he will not afterwards be heard to question the validity of an unfavorable award, on the ground of such irregularity.
2. The failure of one of a board of arbitrators to attend a meeting, when no final action was taken, was a mere irregularity, and not jurisdictional, it appearing that all the arbitrators were present at the last meeting, and all, with the whole evidence before them, consulted and deliberated together concerning their award.

Appeal from District Court of Lake County.

THE facts are stated in the opinion.

MR. WILLIAM HARRISON, for appellant.

MR. J. B. BISSELL, for appellee.

BECK, C. J. The two mining companies which constitute the parties, appellant and appellee, to this appeal, were, in the month of December, A. D. 1880, the respective owners of adjoining mining claims in Lake county. The appellee, being the owner of the *Ætna* mine, complained that the appellant company had, by its agents and servants, crossed the boundary line and committed various trespasses upon its property, including the running of divers drifts, levels and other developments, and the extraction of valuable ores and mineral-bearing substances. It was finally agreed to submit the whole controversy to the decision of five certain individuals, as arbitrators, and in pursuance of this agreement articles of submission were entered into on the 8th day of December, 1880, the respective corporations binding

themselves to abide by the award that should be made by the arbitrators, or any three or more of them, provided the award was in writing and ready to be filed with the clerk of the district court of Lake county on or before the 1st day of January, 1881.

The arbitrators agreed upon duly qualified, investigated the subject of dispute, and on the 29th day of December made their award in writing in favor of the appellee. It was filed with the clerk of the district court on the same day. All the arbitrators signed the award, although one of them, Nelson Hallock, dissented from the conclusion arrived at by his associates.

Afterwards, on the 3d day of January, 1881, the appellant filed a motion to vacate the award, assigning as grounds of the motion certain acts and omissions of the arbitrators pending the investigation.

The district court denied the motion and entered judgment upon the award. The appellant then filed a motion to set aside the judgment, which was also denied.

Exceptions were reserved to these rulings, and it is now assigned for error that the district court erred in refusing to set aside the judgment, and in refusing to vacate the award.

We learn from the record that the arbitrators had three meetings. The first meeting was at the *Ætna* mine, which they visited for the purpose of personally inspecting its workings. The second meeting was held for the purpose of hearing testimony; and the third and last meeting was to hear further testimony, and to deliberate upon and make their award.

The first ground assigned, in the motion to vacate the award, is that the arbitrators did not all meet or act together during the investigation of the matters submitted to them.

The specific objections urged under this head are, that Henderson, one of the arbitrators, did not attend the meeting at the mine, and that Hallock, another arbitra-

tor, did not attend the second meeting, at which most of the testimony was heard and taken.

The appellant supported these objections by affidavits, but the conceded facts concerning the same are embodied in a stipulation signed by the counsel of the respective parties which is inserted in the bill of exceptions.

Referring to the objection that Henderson failed to attend the meeting at the mine, it is proper to consider the object of that meeting, and the action taken thereat. The arbitrators say that they considered it a necessary part of the investigation which they were required to make in the case; but the record shows that no witnesses were examined at this meeting; that no measurements were taken and no rulings made. Its object appears to have been to afford the arbitrators an opportunity to personally inspect the mine and its workings, so as to enable them to comprehend the testimony to be introduced, and the more intelligently to investigate the controversy.

Although Henderson did not visit the mine at the same time the others did, he afterwards, and before the award, visited it in company with one of the other arbitrators, and made the same personal inspection which the others had previously made. He also attended the second and third meetings, was present when all the witnesses were examined, and participated in all the deliberations of the board.

In view of these facts we do not think that the failure of Henderson to meet all his associates at the mine vitiated the award. Merely inspecting the subject-matter of a controversy, without taking testimony or deciding points involved in the litigation, does not constitute a hearing. Such a meeting does not necessarily require the joint action of all the members of a commission, as do meetings at which testimony is to be heard or consultation is to be had and rulings made.

A more serious question is presented by the objection

that arbitrator Hallock did not attend the second meeting, at which the greater portion of the testimony was heard and taken.

This was a meeting which all the arbitrators were required to attend by an express provision of the statute then in force. The provision was:

"All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question." Code of Civil Procedure, 1877, § 283.

The absence of Hallock from this meeting was clearly an irregularity, but whether it was fatal to the validity of the award depends upon whether it was such an irregularity as could be waived by the parties.

The stipulation of counsel shows that the appellant was present and knew of Hallock's absence. It is not pretended that any objection was made to proceeding with the hearing without him, as he had requested should be done when notified to be present.

The simple inquiry, therefore, is whether, under these circumstances, the absence of the arbitrator could be waived by the parties. The well settled rule of law relating to all irregularities in the proceedings of arbitrators which are not jurisdictional is, that an objection, to be availing, must be seasonably made; that if a party, knowing of an irregularity in the proceedings, in order to avail himself of all chances of an award in his favor, remains silent and permits the investigation to proceed, and money to be expended, and the time of all concerned to be consumed for the purpose, he will not afterwards be heard to question the validity of an award that is unfavorable to him. His silence will be construed into consent that the proceedings continue without objection, notwithstanding the error; for had an objection been interposed before the award was made, the irregularity might have been corrected. Neither legal nor moral considerations, therefore, entitle him to raise the objection afterwards.

Morse on Arbitration and Award, p. 171; *Maynard v. Frederick*, 7 Cush. 250; Broom's Legal Max. *137.

The point to be determined in this connection is whether the irregularity complained of is jurisdictional; for it is an elementary principle that consent cannot confer jurisdiction. A void proceeding is a nullity, and the defects which make it void are incapable of being waived. Mr. Sedgwick says: "So it is well settled that not even the most formal and solemn consent can give jurisdiction to a court not authorized to take it. And whenever the objection is raised, although it may be a breach of faith and good morals to insist upon it, still it will be fatal." Sedgwick's Statutory and Constitutional Law, p. 87.

Accordingly this court held in *Haverly Invincible Mining Co. v. Howcut*, 5 Col. 574, that parties to a litigation could not, by agreement, confer jurisdiction to try a cause upon one not a judicial officer authorized by law to hold the court. See, also, *Derry v. Ross et al.* 5 Col. 295.

That many statutory provisions relating to judicial proceedings may be waived by the litigants, and that the waiver may be either express or implied, is beyond controversy. That other provisions cannot be waived is equally well established.

A provision which, if insisted on, would inure to the benefit of a party, not involving principles of public policy, may be waived, and its non-observance will not invalidate the result of the proceeding. But where the requirement is a prerequisite to jurisdiction, or where the purpose of the enactment is to secure general objects of public policy or morals, its observance cannot be dispensed with by consent of parties. Sedgwick's Statutory and Constitutional Law, pp. 87, 359; *Selleck v. Sugar Hollow T. Co.* 13 Conn. 452; *Ives v. Finch*, 22 id. 101; *Florence, etc. R'y Co. v. Ward*, S. C. Kansas, February, 1883; *Abbott v. Dexter*, 6 Cush. 108.

It sometimes becomes a difficult question to determine

whether a statutory requirement is a prerequisite to jurisdiction or not. An illustration of the difficulty is furnished by the contrariety of judicial opinion upon the usual statutory provision that arbitrators shall be sworn before proceeding to hear any testimony. Courts which have held that the oath may be waived base their ruling upon the proposition that the taking of the oath is *not* a prerequisite to jurisdiction, while those of opinion that the oath may not be waived, hold that it *is* a prerequisite to jurisdiction. Among the cases taking the former view are *Howard v. Sexton*, 4 Comst. 157; *Browning v. Wheeler*, 24 Wend. 257; *Woodrow v. O'Connor*, 28 Vt. 776; *Tucker v. Allen*, 47 Mo. 488.

In the following cases the contrary view is presented: *Inslee v. Flagg*, 26 N. J. Law, 368; *Overton v. Alpha*, 13 La. An. 558; *Combs v. Little*, 3 Green Ch. 310; *Hepburn v. Jones*, 4 Col. 98.

We are of opinion that the failure of Hallock to attend the meeting referred to was not jurisdictional.

It follows, therefore, that the error complained of was an irregularity and might be waived by the parties; also that inasmuch as the stipulation shows that the appellant was present at the meeting in question, and knew of the absence of the arbitrator, but interposed no objection to proceeding without him, that the objection made after the award was made and filed came too late.

The appellant does not appear to have been in any manner prejudiced by the irregularity complained of. All the testimony produced at the meeting was written down by a stenographer, and afterwards transcribed by him. The transcript was submitted to Hallock, and read and examined by him without objection, at the final meeting.

All the arbitrators were present at the last meeting, and all, with the whole evidence before them, consulted and deliberated together concerning their award. The objection cannot be sustained. *White v. Robinson*, 60 Ill. 499; *Akridge v. Patillo*, 44 Ga. 585.

The point raised, that the arbitrators made no examination of the books of the Glass-Pendery Company, as required by the articles of submission, is wholly without merit. The stipulation of counsel shows that the appellant did not produce the books for examination, and further, that a complete statement of all that the books contained, pertinent to the case, was, by consent of the appellant, furnished for and used by the arbitrators instead of the books.

The oral objection urged on hearing of the motion below, that the arbitrators refused to allow one Joseph Uhl to be examined as a witness before them on part of the appellant, cannot be sustained in the form presented by the record. The request to examine Uhl as a witness does not appear to have been made by an officer or stockholder of the company, nor by a person authorized to make it. It was made by the foreman of the Glass-Pendery mine, whose position indicates simply an employee in the mine. Nor is it shown what facts the proposed witness could have testified to, without which we cannot say that the testimony would have been material or pertinent.

In the present state of the record it does not appear that the arbitrators refused to receive testimony pertinent to the controversy which was offered by one of the parties thereto, or that they rejected competent testimony upon a point that needed to be proved; nor is it shown that they omitted to pass upon any matters included in the submission.

Upon the whole record we discover no evidence of misconduct upon the part of the arbitrators, and no evidence that any action taken by them was prejudicial to the rights of the appellant. Every step in their proceedings appears to have been taken with the knowledge and express or implied consent of the appellant, and no objections to their proceedings were made until the award was made and found to be in favor of the appellee.

The motion to vacate the award was properly denied, and the same grounds being urged upon the motion to set aside the judgment, it, too, was properly denied.

Affirmed.

RICHARDSON V. BRICKER.

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20a	133

1. A party is estopped from taking advantage of an error in the order of introducing evidence, for which error he himself is responsible.
2. When a suit is upon a cause of action barred by time, and revived by a new promise, the action is upon the contract created by the new promise; and if such new promise be conditional, the plaintiff is not entitled to recover except upon the performance or happening of such condition, and the burden of proving the same rests upon him.
3. A promise to pay "when able" is conditional, and the happening of this condition is a question of fact for the jury.

Appeal from County Court of Gunnison County.

BRICKER, the appellee, had judgment in the county court for \$164.23. The facts are stated in the opinion.

MESSRS. THOMAS, McDUGAL and THOMAS, and Mr. M. BENEDICT, for appellant—*ex parte*.

HELM, J. We will not determine whether, in an action of this kind, without written pleadings, it is error, at the trial, to allow proof in rebuttal of a new promise after defendant has offered the statute of limitations in bar of the action. It appears from the record, though not from the abstract thereof, that plaintiff attempted to introduce evidence of the new promise, in chief, but that defendant objected, and the court ruled it out. We think that defendant is estopped from taking advantage of an error, if such it be, in the order of proofs for which he is himself responsible.

Nearly eleven years passed between the maturity of the note and the commencement of suit thereon; plaintiff

iff's action was, therefore, barred by our statute of limitations, and he could only recover upon proof of a new promise sufficient in law to revive the debt, or give him a new right of action therefor.

For this purpose but one witness was sworn; his testimony is somewhat ambiguous; he says in one breath that there was an unconditional promise to pay at a specified time, and in the next he admits that defendant promised to pay when "he got the money, or sold his coal land, or became able, or turned in some stock." But, upon a careful consideration of his entire testimony, we think, if it established anything, it is that the new promise was to pay when able, or to pay on the 30th of the current month, provided a sale of some coal land was effected. No evidence whatever was offered by plaintiff to show that, at the commencement of the action, defendant was able to pay the note, or that he had sold his coal land.

The suit is upon the contract created by the new promise, and, therefore, if such new promise be conditional, the plaintiff is not entitled to recover, except upon the performance or happening of such condition, and the burden of proving the same rests upon him. 2 Greenleaf's Evidence, § 440, and note; Wood, Lim. of Actions, § 78, and notes.

If the new promise in this case was to pay the note upon the sale of coal lands, it clearly devolved upon plaintiff to prove such sale; so, also, if the new promise was to pay when able, we think it was plaintiff's duty to establish defendant's ability to do so.

Upon this question, however, there is some conflict of authority. In Illinois, Connecticut, Vermont and New Hampshire, it is held that promises to pay "when able," "as soon as possible," "when I can," "as soon as he could," were not conditional. It is said that these phrases following a promise are too uncertain to constitute a condition. *Horner et al. v. Starkey*, 27 Ill. 13; *Cummings*

v. Gossett, 19 Vt. 310; *Norton v. Shepard*, 48 Conn. 142; *First Congregational Society v. Miller*, 15 N. H. 522.

But we think the weight of authority, as well as the better reason, supports the position that the promise to pay "when able" is conditional; of course the expression must be construed as referring to financial ability.

In this case the statutory bar had attached before the new promises were made. The debtor was under no legal obligation whatever to pay the debt. While the indebtedness itself was not canceled, it could never be collected by judicial proceedings if he saw fit to invoke the statute. Whatever promise he made was entirely voluntary; and the authorities universally recognize his right to impose any condition which he might deem proper. By agreeing to pay when able, he practically declared that he would not bind himself unless he then had, or should thereafter acquire, the means to do so; and it is difficult to understand how it can truthfully or logically be said that his promise was absolute and unconditional; the very language used indicates an intention not to renew the liability, except upon the conditions above mentioned.

It may be hard for the creditor to prove the debtor's financial ability, yet it is not more difficult for him to do this than to prove a great many other conditions which might legally be imposed.

This is not a matter left to the debtor's discretion and judgment; his ability to pay is a question of fact for the jury, and that body might find that he was able to do so at the very time he made the conditional promise.

The law regards the creditor as culpable for not enforcing his demand within the statutory period, and the leading authorities are now decidedly against removing the bar of the statute and relieving him from the result of such negligence, except upon clear proof of a new promise and the performance or fulfilment of the conditions, if any, attached thereto. See generally upon this

subject, 2 Greenleaf's Ev. § 440 and note, *supra*; Wood on Lim. of Actions, § 78; *Mattacks v. Chadwick*, 71 Me. 314; *Tompkins v. Brown*, 1 Denio, 248; *Bidwell v. Rogers*, 10 Allen, 438; *La Forge v. Jayne*, 9 Pa. St. 410; *Sedgwick v. Gerding*, 55 Ga. 264.

No effort whatever was made to connect the letter offered in evidence by plaintiff with the particular debt upon which the action was brought. The letter itself does not refer to such indebtedness except by a strained implication. Considered alone, it entirely fails to establish such a clear and explicit acknowledgment of indebtedness as the law requires to constitute a new promise. It is not necessarily the acknowledgment of any debt whatever; for aught that appears therein, the money promised upon the sale of property may have been a loan to plaintiff.

It is questionable whether a general admission of indebtedness, however clear, is sufficient if it be not shown unmistakably to relate to the particular demand sued for, unless, from the nature of the debt in controversy, or the particular circumstances connected therewith, a legal presumption fairly arises that such debt was referred to. Wood on Lim. of Actions, p. 155 and note 2; *Miller v. Baschore*, 83 Pa. St. 356.

But there is no question as to the insufficiency of such a doubtful and equivocal recognition of *any* indebtedness whatever as is contained in the letter under consideration.

The court erred in finding, upon the evidence adduced, that defendant made a new promise to pay the debt in controversy, sufficient to avert the statutory bar. The judgment resting upon such finding must be reversed and the cause remanded.

Reversed.

TUCKER, SHERIFF, ETC., V. PARKS, ASSIGNEE.

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8	291
9	554
10	367
7	62
13	59
13	564
7	62
14	539
7	62
15	473
16	313
7	62
17	375
17	568
7	62
2a	234
7	62
19	234
7	62
23	396
7	62
18a	556
7	62
17a	474
7	62
34	84
20a	359
7	62
35	71

1. The fact that an assignee of an insolvent firm is an attorney at law does not disqualify him from acting as such assignee.
2. The code requires that the defendant's answer shall contain a specific denial to each allegation in the complaint intended to be controverted, and every material allegation not controverted shall, for the purposes of the action, be taken as true; therefore, *held*, that an averment of value of goods and damages for their detention, in the complaint, in an action of replevin, are material allegations, and a failure to deny them is to admit them to be true.
3. It is a familiar rule that evidence cannot be given of facts not alleged in the pleadings, and that neither admissions nor stipulations can make a case broader than it is by allegation. Neither can a party have relief beyond what the averments of his pleadings entitle him.
4. When it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the damages must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise at the trial.
5. Fraud must be specially pleaded in an answer as well as in a complaint.
6. Where a transcript does not purport to give all the instructions given on behalf of either party, and the appellant admits that other instructions were given, this court cannot be advised that the refused instructions contain any correct proposition of law, applicable to the case, which was not given to the jury. For the same reason the form of a judgment being omitted from the transcript, objection to it will not be considered.

Appeal from District Court of Lake County.

REPLEVIN, by Daniel E. Parks, assignee of Freudenfeld and Jelenko, against Tucker, sheriff of Lake county. The instruction given upon the question of damages, and held to be erroneous, was as follows:

Fifth instruction. The court instructs the jury that the value of the goods in controversy herein is admitted by the pleadings in this cause to be \$7,946.20, and the damages are likewise admitted to be \$1,000, and that if the jury believe from the evidence that the plaintiff is

entitled to recover in this cause, they will find his damages to be the sum of \$1,000, and will also adjudge that the defendant return to the plaintiff the goods in controversy, or to pay him their value above mentioned." The facts are stated in the opinion.

Mr. R. D. THOMPSON and Mr. W. H. NASH, for appellant.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellee.

BECK, C. J. The objection to the introduction in evidence of the articles of assignment was not well taken. It was that the assignee was an attorney at law, and that the instrument provided for the payment to him of counsel fees.

The fact that Parks was an attorney at law did not disqualify him from acting as the assignee of an insolvent firm. In the case cited in support of the objection (*Nichols v. McEwen*, 17 N. Y. 22), the assignment provided for the payment of "a reasonable counsel fee," in addition to the "expenses, costs, charges and commissions" of executing the assignment, and for that reason was held void. The court regarded the attempt to charge an already deficient fund with a counsel fee, in addition to the regular commission authorized by the statute, as indicating a fraudulent intent in the whole transaction.

The language of this instrument is different, however, and does not, we think, attempt to charge the insolvent estate with counsel fees. It is as follows: "That said assignee shall first pay and disburse all the just and reasonable expenses, charges, costs and commissions attending the due execution of these presents, and the carrying into effect the trust thereby created, together with a reasonable compensation or commission for his own services."

No allusion is made to either professional services or

to professional fees. All that the instrument authorizes the assignee to pay to himself for his own services is a reasonable compensation or commission. This provision discloses no fraudulent intent, since the assignee, whether lawyer or not, would be entitled to a reasonable compensation or commission for the services specified, which is all that is provided.

The most important questions presented by this record arise upon the pleadings, and upon the rulings and instructions relating to the subject of the recovery.

The complaint avers that the value of the goods seized upon the writs of attachment is \$7,946.20, and that the plaintiff's damages for the detention are \$1,000. Neither of these allegations is denied by the answer of the defendant. The plaintiff closed his testimony on the trial without offering proof in support of either averment, whereupon defendant moved for a non-suit, upon the ground that the plaintiff had proved no value to the property sought to be replevied.

This motion was denied by the court on the theory that defendant's failure to controvert in his answer to the complaint the allegations of value and damages, admitted the same to be true as stated.

Defendant then offered evidence to show the value of the goods, their condition and the amount realized by their sale under the attachment proceedings, which offer was likewise denied.

The court instructed the jury that the value of the goods in controversy was admitted by the pleadings to be \$7,946.20, and the damages were likewise admitted to be \$1,000. A verdict for the plaintiff was returned accordingly.

Counsel for the defendant insist that the court erred in denying the motion for non-suit, in rejecting the defendant's testimony on the subject of value, and in the instruction referred to.

The correctness of the above rulings depends upon the

construction to be given certain sections of our Code of Civil Procedure, which we will proceed to consider.

Section 57 provides that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant's answer."

Section 72 says: "Every material allegation of the complaint or answer, not controverted by the answer or replication thereto, shall, for the purpose of the action, be taken as true."

On behalf of the appellant, who was defendant below, it is insisted that the averments of the complaint on the subject of value and damages are not "material allegations," and that a failure to deny them does not admit them to be true. That to entitle the plaintiff to recover in this action it was essential for him to prove the value of the goods and the amount of damages sustained. In support of this position we are cited to the following cases: *Newman v. Otto*, 4 Sandf. 668; *Sopris v. Webster*, 1 Col. 507; *Connors v. Meir*, 2 E. D. Smith, 314; *Jenkins v. Steanka*, 19 Wis. 126.

The doctrine of these cases is shown by the following citations from *Newman v. Otto*:

"No allegation can be deemed material unless an issue taken upon it will decide the cause, so far as relates to the particular cause of action to which the allegation refers."

"In an action sounding in damages, the defendant, by not denying the allegations as to damages and as to their amount, does not admit them. The plaintiff must prove the amount thereof, or he will only be entitled to nominal damages; so, in trover, a failure to deny the allegations as to the value of the property does not admit the value as alleged in the complaint."

The case of *Connors v. Meir*, *supra*, was an action in the nature of trover, for illegally detaining plaintiff's watch, alleged to be of the value of \$20. In considering

the section of the New York code which provides that material allegations of the complaint, not denied by the answer, shall be taken as true for the purposes of the action, the court say that the provision is but the reenactment of a rule as old as the principles of pleading; that every allegation in a pleading was always taken as true if not denied, and that it was in this sense that the term "*material allegation*" was used in the code. It means an allegation without proof of which the plaintiff must fail in his action.

They also say that before the code the averment of value in such action was matter of form, and could not be made the subject of an issue; that its omission was cured by pleading to the merits; that it need not be proved as laid, and even a plea of justification did not admit it. It was only necessary to prove an illegal detention of the plaintiff's property to maintain the action.

In *Jenkins v. Steanka*, *supra*, the supreme court of Wisconsin held that, before the code in that state, it was not necessary for the defendant in trover, trespass, or replevin, to deny either the averment of *value* or damages, and that the code had not altered the practice in this respect.

Sopris v. Webster arose under the common law practice which prevailed in the territory of Colorado before the enactment of the Civil Code, and is to the same effect.

The foregoing adjudications (and many more of the same tenor might have been cited) are based upon the principles and forms of pleadings as they existed at common law.

All save *Sopris v. Webster*, which was prior to the passage of the code, construed the code provision under consideration as not including allegations of *value* or *damages*, in actions of this character. They held that the effect of a failure to deny such allegations is the same under code practice as under the old system. This is to be accounted for in part for the reason assigned in *New-*

man v. Otto, supra, that the codes referred to had not defined the meaning of the term "*material allegations*," as employed therein. Its former technical signification was, therefore, naturally continued by the courts.

Our code, however, defines the term, and effect must be given the definition in construing the act. The definition is as follows: Section 73 (§ 76, Code of 1883). "A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient."

Another section authorizes matters not essential to the claim or defense to be stricken from the pleadings on motion. Laws 1879, p. 215, § 1 (section 65, Code of 1883).

Let us see now what the plaintiff is required to state, in this class of actions, and what relief he is entitled to under proper allegations. When he seeks the recovery of *money or damages*, the amount of his claim must be stated in the complaint. Civil Code, § 50 (section 54, Code 1883).

The plaintiff always seeks this kind of relief in replevin, when the property has not been delivered to him, as in the case at bar. In such case the jury is required, by § 182, to find the value of the property, and to assess the plaintiff's damages, if any are claimed in the complaint.

To complete the remedy, § 207 authorizes judgment in the alternative for possession of the property, or, in case a delivery cannot be had, for the value of the property and damages for the detention.

This is the relief demanded in the present action. Both the value of the merchandise taken, and the amount of damages alleged to have been sustained by their detention, were stated in the complaint, the same being the allegations which appellant says were immaterial, and could not be admitted by a failure to deny them in the answer.

Testing their materiality by the rule furnished by the code, the inquiry is, were these allegations essential to

the plaintiff's claim, and could they be stricken from his complaint without leaving it insufficient?

The record shows that the goods were sold by the defendant by virtue of the attachment proceedings, hence they could not be returned. The plaintiff, then, could have no relief in this action save by a verdict and judgment authorizing the collection of their value in money and damages. But, as we have seen, he would not be entitled to such a judgment had the aforesaid allegations been omitted from his complaint. These considerations demonstrate their materiality under our practice, and it follows that the failure of the defendant to deny them admitted them to be true.

It is a familiar rule that evidence cannot be given of facts not alleged in the pleadings, and that neither admissions nor stipulations can make a case broader than it is by allegation.

A party can have no relief beyond what the averments of his pleadings entitle him. Harsten's Pr. p. 152; *Hicks v. Murray*, 43 Cal. 522.

The fact that the law makers who framed the codes of Iowa and Kansas, both of which are similar to our own on this subject, deemed it necessary to limit the operation of the rule under consideration, indicates their apprehension that without such limitation it would include allegations of value and damage.

In Iowa the qualification is: "But an allegation of value or amount of damage shall not be deemed true by a failure to controvert it." Iowa Code (1873), p. 456, § 2712.

In Kansas it is: "Allegations of value or amount of damages shall not be considered as true by failure to controvert them; but this shall not apply to the amount claimed in actions on contract, express or implied, for the recovery of money only." General Stat. Kan. (1868) p. 653, § 128.

In California, on the contrary, where code provisions

upon this point similar to our own exist, they appear to be construed to have the same effect which we have herein given to corresponding sections of our code. *Tully v. Harloe*, 35 Cal. 302.

For the reasons assigned, we are of opinion that the value of the property was admitted by the pleadings, and that the evidence offered was inadmissible.

Referring now to the extent of the recovery, we remark that damages may be *general* or *special*; and that while an averment simply specifying the amount claimed, as in this complaint, is sufficient for the recovery of general damages, it is insufficient to warrant the recovery of special damages.

When it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the rule is that they must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise on the trial. Wells on Replevin, 311; *Dickinson v. Boyle*, 17 Pick. 78; *Stevenson v. Smith*, 28 Cal. 103; *Brown v. Cummings*, 7 Allen, 507.

In this case there is no averment that would authorize the recovery of special damages. There is only the general allegation of damages in the sum of \$1,000. It is evident that this amount of damages was not a natural consequence of the act complained of. The goods were to be exposed to sale. The presumption is that they would not have sold for more than their value, which sum is recovered in this action. The only damage, therefore, which appears to be the natural and necessary consequence of the taking, is that resulting from their detention. This sum or amount must be ascertained by the rule adopted in this state, which rule is sanctioned by numerous authorities. It is to compute interest on the value of the property from the time of the wrongful

taking to the time of trial. *Machette v. Wanless*, 2 Col. 170; *Hanuer v. Bartels*, id. 514; Sedgwick's Leading Cases on Measure of Damages, pp. 556, 557.

The record shows that the goods were taken January 10, 1880, and that the cause was tried January 20, 1881. Interest at the rate of ten per centum per annum on \$7,946.20, for the above interval, was all that the plaintiff was entitled to.

If other items of damage were sustained, they were not recoverable, because not alleged. The admission of the allegation of damages was only an admission that the plaintiff had sustained such damages as were consequential upon the facts alleged. *Stevenson v. Smith*, 28 Cal. 103. The instruction given upon this point was erroneous.

Another error assigned, involving a question of pleading, is that the court rejected the offer of the defendant to prove that, a short time prior to the assignment, the assignors fraudulently, and without consideration, transferred a portion of the same stock of goods to one Wineright, who afterwards employed the assignors to sell them at auction; and that Parks, the assignee, with all this knowledge before him, took no steps to assert the rights of the creditors to these goods, but employed Wineright to assist him in invoicing the stock.

This proof would have been admissible under proper pleadings, but there was no issue in the case to which it was responsive. The complaint alleged ownership and right to possession. These were proper averments. *Dambman v. White*, 48 Cal. 452. The answer denied such ownership and right of possession; alleged ownership in Freudenfield & Jelenko, the assignors, and the taking of the goods by the defendant, as sheriff, by virtue of certain writs of attachment against said owners.

Neither fraud, nor any other matter in avoidance of plaintiff's title, was set up in the answer. The plaintiff

proved his title and right to possession, by producing in evidence the deed of assignment. Defendant then attempted to avoid the deed by proof of circumstances tending to show that it was given in fraud of the rights of creditors, and void for that reason. This testimony was not admissible. Fraud must be specially pleaded in an answer, as well as in a complaint. There were no facts stated in the answer apprising the plaintiff that his title would be assailed in this manner.

In *Gray v. Earl*, 13 Iowa, 188, it was held that before a defendant in replevin could attack the plaintiff's right of possession, on the ground that it was obtained through fraud, such fraud must be specially pleaded. See, also, *Dyson v. Ream*, 9 Iowa, 51; *Capuro v. Builders' Ins. Co.* 39 Cal. 123; *Lefler v. Field*, 52 N. Y. 622; Bliss on Code Pleading, §§ 211, 339.

The error assigned for refusal to give certain instructions prayed by defendant cannot be considered, for the reason that the transcript does not purport to give all the instructions given on behalf of either party, and the appellant admits that other instructions were given. We are not advised that the refused instructions contain any correct proposition of law, applicable to the case, which was not given to the jury.

For the same reason we cannot consider the objection to the form of the judgment. Its form is not before us, having been omitted from the transcript. The verdict was sufficient to authorize a judgment in the alternative, for the possession of the property, or the value thereof, in case a delivery could not be had, as authorized by § 207 of the code. In the absence of any facts showing the contrary, the necessary intendment is that the action of the court below was correct.

The objection to the complaint, that it does not state facts sufficient to constitute a cause of action in replevin, is not well taken. We deem the complaint sufficient, so far as this objection is concerned. Other objections

thereto, if they exist, should have been made in the court below, to entitle them to notice here. *Fasset v. Mulock*, 5 Col. 466. The cause is reversed and remanded for a new trial.

Reversed.

TRIPP ET AL. V. OVEROCKER ET AL.

1. A statute which assumes to limit or direct the compensation to be paid for private property, when taken for public or private use, is to that extent unconstitutional.
2. When, however, part only of an act is unconstitutional, it does not necessarily follow that the whole statute must fall, and the same is true of the different portions of the same section. Whether the valid portions shall be enforced depends upon the design of the entire law, and their connection with the void provisions. The act should be sustained, if the unconstitutional portions can be stricken out and the law still be such as to accomplish the purpose of the legislature.
3. By the terms of the constitution the compensation for taking or damaging private property, against the owner's consent, must be ascertained by a jury or board of commissioners. This requirement cannot be dispensed with by legislative enactment. And under the statute the ordinary civil action cannot be resorted to, but the object can only be reached by special proceedings under the act on the subject of eminent domain.

Appeal from District Court of La Plata County.

THE facts are stated in the opinion.

MESSRS. HUDSON and SLAYMAKER, for appellants.

MR. EUGENE ENGLAY, for appellees.

HELM, J. In 1881 the legislature of Colorado enacted: "That no tract or parcel of improved or occupied land in this state, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property to lands adjoining or beyond the same, when the same object can feasibly and

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17	830
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7	72
23	809
23	804

practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

Also: "No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch, by him or them constructed, in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch." General Statutes, §§ 1716, 1718.

Plaintiffs in the court below attempted to bring this suit under the latter section. Their object was to coerce consent of defendants, by decree of the court, to their use and enlargement of a ditch theretofore constructed by defendants for their own private benefit. Plaintiffs were entitled to the right of way over defendants' lands for a ditch upon payment of just compensation therefor, by virtue of both constitutional and statutory enactments. Sec. 7, art. XVI, Const.; General Laws, §§ 1373, 1374 and 1058. But the lands of defendants were cultivated, and plaintiffs were prohibited, by § 1716 above mentioned, from taking a second ditch across the same to irrigate their premises beyond, if they could feasibly convey the necessary water through that of defendants'.

We think it was competent for the legislature to adopt § 1716 aforesaid; it does not conflict with the constitutional provisions granting a right of way for the construction of ditches; but, while recognizing the privilege, it simply undertakes to regulate the exercise thereof so as to inflict the least possible inconvenience and injury upon the owner of the servient estate. Section 1718 is, in most respects, a complement of § 1716. In providing that the owner of an existing ditch upon or across his own land, or the land of another, shall not prohibit or prevent a third person from using and enlarging the same, the legislative intention evidently was to render

more effective the equitable design expressed by the former section. But, in so far as the latter undertakes to limit or direct the compensation to be paid for the property, it is clearly unconstitutional and void. For there are other elements of "taking or damage" which cannot be ignored in determining the "just compensation" required by our constitution. It will almost always happen that the proprietor of the ditch will also be owner of a part, at least, of the land upon which the same is constructed; and the legislature cannot say that he may not be paid something for the right of way, and for the damages to his land occasioned by enlarging the ditch, as well as for other injuries which a jury or board of commissioners might discover.

Property is defined as being "the right to possess, use, enjoy and dispose of a thing." The "thing" mentioned does not always have a tangible or physical existence; it may be an easement, or anything else that can become the subject of private ownership. The proprietor of an irrigating ditch, whether upon his own premises or those of another, has a property ownership, both in the ditch and the right of way therefor. And using or enlarging such ditch, without the owner's consent, is as much a taking or damaging of private property within the meaning of the constitution, as would be appropriating the right of way therefor, in the first instance. But such taking or damaging cannot be tolerated except upon payment, in a constitutional manner, of just compensation. See *Mills on Eminent Domain*, § 31, and cases cited.

When, however, part only of a statute is unconstitutional, it does not necessarily follow that the whole statute must fall, and the same is equally true as to different portions of the same section, where the act is divided into sections. See *Commonwealth v. Hitchings*, 5 Gray, 485. Whether the valid portions shall be enforced depends upon the design of the entire law and their connection with the void provisions.' It would be inconsistent with

all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent upon others which are unconstitutional." Cooley's Constitutional Limitations, p. 176 (3d ed.), and cases cited.

We have already discussed the legislative purposes in adopting the statute under consideration, and have expressed our satisfaction with the wisdom thereof, and also with the validity of the law, except in the particular above mentioned. A careful examination of the entire act convinces us that if the objectionable phrases were stricken out, a good law would remain, and the purpose of the legislature would still be accomplished. We feel warranted in entertaining the belief that it was not the legislative design to have the enforcement of the whole act contingent upon the validity of the provision therein on the subject of compensation.

This act must be considered in connection with other statutes as well as the constitutional provisions upon the same subject. And when so construed, omitting the objectionable part, no trouble will be experienced in giving it full force and effect. The right to enlarge and use the ditch of another already constructed will be enforced in the same manner, and under the same law, as the right to take or damage any other kind of private property.

By the terms of the constitution (art. II, § 15), the compensation for taking or damaging private property against the owner's consent must be ascertained by a jury or board of commissioners; this requirement is imperative, and the legislature is powerless to dispense with it. Our act on the subject of eminent domain (General Laws of 1877, § 1058 *et seq.*) prescribes a complete system of procedure for the taking or damaging of private property, and determining the compensation therefor, when the same is authorized by law. It complies with the constitution in providing for a board of commissioners or

jury, but is a special proceeding, and differs in many respects from our ordinary civil action.

This suit was brought in the court below as a civil action under the code, which was improper, as was likewise the trial thereof without the aid of a jury or board of commissioners. Defendants' demurrer to the complaint should have been sustained.

The judgment must be reversed and the cause remanded, with directions to the district court to enter a judgment dismissing the same.

Reversed.

WILLARD V. MATHESUS.

It is the duty of the herder in charge of a flock of sheep to use ordinary care to prevent their trespassing upon crops, and, in the absence of such care, the owner will be held responsible for resulting damages. *Morris v. Fraker*, 5 Col. 425, distinguished.

Appeal from County Court of Elbert County.

THE facts are stated in the opinion.

Messrs. WELLS, SMITH and MACON, for appellant.

Mr. R. A. LONG, for appellee.

HELM, J. Appellee was the owner of a quarter section of patented land; forty acres of this land were inclosed by a pole and slab fence, which, according to the evidence, was probably sufficient to protect appellee's crops from cattle and horses running at large; but it was no protection against sheep, as they could pass through it almost anywhere without injury either to themselves or to the fence. Appellant's flocks, while in charge of herders, strayed upon appellee's lands through her said fence and damaged her hay crop. She brought suit. The cause was tried, on appeal, by the county court without the intervention of a jury, and judgment rendered in her

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favor for the sum of \$50 damages; from that judgment this appeal is taken.

Several years before these alleged trespasses occurred our legislature adopted what is known as the fence law; in this act they specify what shall be a lawful fence, and provide that any person suffering injury to his crops by the trespass of animals may recover damages for such injury, provided the crops be surrounded by such a fence as is therein described. But the statute was not to take effect or be in force in any county until the people of such county adopted the same by a popular vote.

Nothing appears in the record of this case showing the adoption of the fence law by the people of Elbert county. We must, therefore, presume that it has never taken effect therein, and determine the rights of the parties to this action by the general law prevailing in Colorado in the absence of statute. *Morris v. Fraker*, 5 Col. 425.

Under the old common law, "every one was bound to keep his beasts within his own close, and if they went upon the grounds of another the owner was liable in damages unless he could show that the lands trespassed upon should have been fenced, either by prescription, agreement or assignment."

In the case of *Morris v. Fraker*, *supra*, this court declared that the above common law rule, in so far as it refers to cattle running at large upon the range, is inapplicable to Colorado, and, therefore, does not prevail. That on the contrary, "the general law of the state permits the owners of cattle to allow them to range at will, and that in the absence of local acts the owners of crops can only recover for damages done thereto by the trespasses of cattle, when the same are, at the time of the trespass, inclosed by good and sufficient fences." 5 Col. 433.

The owner of cattle in this state relies almost entirely upon his recorded brand and upon the annual round-up for identification thereof, and protection from loss; ex-

cept in a few isolated instances, such stock is never, either in summer or winter, confined to an inclosed area or kept close-herded upon the range. And the conclusion arrived at in the opinion above mentioned is based largely upon the general custom that has always prevailed among stock men in this country, of allowing their cattle to *roam at will* upon the public domain. But persons who make sheep raising and wool growing their business always pasture in inclosures or close-herd upon the range. The difference in intelligence and instinct, in disposition and physical characteristics, between sheep and cattle, renders it absolutely necessary to handle them differently. A flock of sheep turned loose to run at will upon the range would soon be entirely lost to the owner. True, there is no law, except that of self-interest, to prevent the owners allowing them to run at large. But the custom of close-herding sheep is as fully established and as universally recognized as is that of allowing cattle to range at will. The reason of the law is said to be its life; and since the principal reason for the rule stated in *Morris v. Fraker* does not exist in this case, we are not prepared to recognize and apply that rule herein.

That which has become by long practice and recognition an established custom is law, and is accepted as such until abrogated by statute, or fallen into disuse. People make contracts and transact business with reference thereto; and rights acquired thereunder are protected by the courts. The farmer in Colorado, aware of the established custom of letting cattle run at will, in the absence of statute builds a fence sufficient to protect his crop against trespass therefrom; but being advised of the equally well established custom of inclosing or close-herding sheep, he does not so construct his fence as to keep them out of his field. It would be manifestly unjust to apply the same rule for injuries to his crop by the latter that would be applicable for like injuries, under similar circumstances, by the former.

It appears that, at the time of the trespasses complained of in this case, appellant's flocks were in charge of herders, and we are not called upon to determine the rights of the parties had the sheep been actually running at will, notwithstanding the custom aforesaid. It is sufficient, therefore, for the purposes of this case, to say that when a flock of sheep is in the charge of herders upon the range, ordinary care shall be exercised in preventing a trespass thereby upon the crop of another. That in such case, when the crop is of such a nature as to be readily recognized, or is surrounded by a fence of any kind, so that the herder may know when he reaches its vicinity, he shall use reasonable or ordinary care to prevent the sheep from going upon the same and doing injury thereto. And that if such ordinary care be not exercised, and a trespass and injury result, the owner of the sheep shall be liable in damages therefor.

In view of our conclusions above stated, we must affirm the judgment of the county court; for the amount of damages found is not more than a reasonable compensation for the injuries to appellee's *inclosed lands* by appellant's flocks. The use of ordinary care by appellant and his agents is a question of fact; the court below determined this question in favor of appellee, and we do not feel warranted in disturbing the finding. The judgment will be affirmed.

Affirmed.

DORR V. HAMMOND.

In an adjudication by a referee, under the statute as to priority of water rights, the decree may be modified for error of the referee in his judgment upon the weight of the testimony.

Appeal from District Court of El Paso County.

THE facts are stated in the opinion.

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Mr. J. M. DORR, for appellant.

Mr. JOHN B. COCHRANE, for appellee.

BECK, C. J. This was an adjudication before a referee, under the act of 1881 (Bromwell's Comp. pp. 580 to 590), of the priority of right, as between the owners of the Hammond slough ditch and the Robbins ditch, to take water through their respective ditches from a certain slough on the north side of Cheyenne creek.

The appellant, J. M. Dorr, is the owner of the Robbins ditch, and the appellee, J. H. Hammond, is the owner of the Hammond slough ditch.

Twelve witnesses were examined by the referee, and their testimony reduced to depositions and copied into the bill of exceptions.

The referee found that the Hammond ditch was first in the order of priority, and that the Robbins ditch was second in priority, and numbered them accordingly. Dorr filed exceptions to the report and findings of the referee, which were heard and overruled by the district court, and the findings and decrees of the referee approved.

The proceedings below appear to have been conducted in strict conformity with the statute, and if any errors have been committed by the referee they grow out of his judgment upon the weight of the testimony. That he erred in this respect we are fully satisfied from a careful examination of the whole testimony.

The land owned by Dorr is the southwest quarter of section 19. Hammond owns the eighty acre tract adjoining on the south side. The slough from which the water for both ditches is taken appears to extend from the west to, or upon, the eighty acre tract. Both ditches appear to be taken out upon the Smith ranch, lying to the west, the Robbins ditch on the north side of the slough, and the Hammond ditch on the south side of the slough.

The testimony may be fairly said to establish the fact

that the Robbins ditch was made in 1868, and that it has been used ever since, during the irrigating seasons, to convey water from the slough to and upon the southwest quarter of section 19, and that the right to take water from the slough through this ditch has been continuously claimed by the owners and occupants of this quarter section ever since its construction. So it is unnecessary to review the evidence upon this point.

The testimony also proves that a small ditch was taken out upon the south side of the slough, upon the eighty acre tract, by Foster, one of the prior owners thereof, in 1866, and that it was used one season. The land then passed into other hands, and the testimony fails to show that the subsequent proprietors used, claimed or even knew of such a ditch until the claim preferred by the present occupant, Hammond.

The previous owners appear to have been Foster, Watson, Flanagan and Hall, in the order of time as named.

Foster's testimony is to the effect that he made the ditch in the spring of 1866, used it during one irrigating season, then sold the land, and did not see the ditch for four or five years afterward. He owned an interest in the Wolf ditch, which is taken out of Cheyenne creek, and which ditch covers the same land.

His wife, Elizabeth Foster, says she was present when her husband made the ditch; that it was in the spring of 1866; that it was made by plowing one furrow and cleaning it out with a shovel.

Flanagan says he purchased the land from Watson in November, 1867, and sold it to Hall in November, 1870. Afterwards he acted as agent for Hall in respect to the land. During all this time it was watered from Cheyenne creek, and he did not know of the existence of the ditch now called the Hammond slough ditch, or of any ditch taken out of the south side of the slough. If there had been such a ditch he says he would have known it. He knows the Hammond ditch, but thinks it was made after

he sold the land. He owned the eighty when the Robbins ditch was taken out — interposed no objections, and claimed no priority.

The testimony of Thomas H. Robbins is that he purchased the quarter section in the early part of 1867; lived upon it for six years; that he took out the Robbins ditch in March or April, 1868, and used it continuously until the spring of 1873, neither Flanagan nor Hall interfering with his use of the water, or claiming priority in respect to its use.

He was familiar with the eighty acre tract south, and the Hammond ditch was not there while he owned and lived upon the quarter section, nor during the next year thereafter. He did most of his hauling over the eighty, and if there had been a ditch where it is now claimed to have been, it was so filled up that he never saw it. He says: "In the year 1869 we plowed where quite a portion of the present ditch is. I think it was in 1869; it might have been in 1868. Mr. Frank Flanagan owned or had control of this land at the time."

John Wolf says he settled in the neighborhood in 1862, and has lived there ever since. He knows the slough and both tracts of land — knows of the Robbins ditch being taken out of the north side of the slough, but don't know of any other ditch being taken out of the slough up to that time. He frequently passed over the ground, and thinks if a ditch had been taken out on the south side prior to 1868, he would have noticed it.

The owners of the eighty acre tract owned one-fourth of the Wolf ditch, and prior to 1868 the land was watered from that ditch.

James Roberts testified that he passed backward and forward along Cheyenne creek for ten years, extending from 1860 to 1870. He knew the two tracts of land and the slough. Part of the slough was formed from water that ran down from his residence or land. He says there was no ditch on the south side of the slough during this

period — he frequently passed by, and would have known it if there had been; most of the table land of the eighty was irrigated from the Wolf ditch.

The testimony of the other witnesses, including that of the appellee, Hammond, is of later date, and of but slight importance upon the question of priority.

The conclusion is irresistible, upon a review of the whole record, that the right of priority acquired by Foster by means of the furrow plowed by him to tap the slough in 1866, and his use of the water during that season, was afterward abandoned.

The testimony shows that no water was thereafter taken from the slough upon this tract of land for many years, and that the furrow mentioned became so obliterated as not to be noticeable by those driving over and plowing the land across which it had been run.

The subsequent owners of the land interposed no objections to the appropriation of the water by Robbins, but, on the contrary, stood by and saw him construct his ditch, and permitted him for years to divert the water from the slough into it, without even notifying him of the prior appropriation. These facts amount to a voluntary yielding up and waiver of the priority acquired by Foster, without any intention of resuming it, and constitute a clear case of abandonment.

The Robbins ditch, then, should have been decreed priority over the Hammond slough ditch, and numbered accordingly.

It is ordered that the decrees be modified in the particulars named, and that the appellee pay the costs of the appeal.

Remanded.

DUCKET ET AL. V. PRICE ET AL.

Under the code (section 141, Code of 1883) suit may be brought upon an injunction bond in the first instance against the principal and sureties, and the damages assessed and awarded in such action.

Appeal from District Court of Fremont County.

THE case is stated in the opinion and was heard *ex parte*.

MESSRS. THOMAS, McDUGAL and THOMAS, and Mr. M. BENEDICT, for appellants.

BECK, C. J. Appellants brought suit in the court below upon an injunction bond, averring in their complaint the dissolution of the injunction, and stating several claims for damages accruing to them by the wrongful suing out of the injunction.

Appellees, who are the principals and sureties upon the injunction bond, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the appellants amended their complaint; appellees demurred to the amended complaint, assigning the same ground of demurrer. The court again sustained the demurrer, and, appellants declining to plead further, judgment was given for the appellees dismissing the complaint, and for costs, from which judgment the appellants have prosecuted this appeal.

The appellees have made no appearance in this court, and the cause has been heard *ex parte*. We are therefore not advised by the appellees what they rely upon as the fatal defect or defects in the complaint, which can be reached by a general demurrer. No damages were awarded on dissolution of the injunction, nor have any been assessed and awarded in any proceeding instituted for the purpose since its dissolution.

Courts have held, under dissimilar statutes, however, that no right of action accrued upon an injunction bond until damages were assessed and awarded against the complainants in the injunction proceedings.

Section 139 of our Civil Code provides that this shall not be necessary in cases of this character, but that principal and surety may be sued together in the first instance, and the damages assessed and awarded in such action.

If, therefore, this objection be relied upon, it is untenable.

We are of opinion that other objections to the complaint, if they exist, should be specially assigned.

The judgment is reversed and the cause remanded for further proceedings.

Reversed.

OWEN V. GOING ET AL.

No appeal lies from an order vacating a judgment. Courts have power over the orders and judgments during the term, and an order made setting aside a judgment rendered during the term, however erroneous, vacates the judgment, and is not subject to review. A subsequent order of the court setting aside the order vacating the judgment does not have the effect to revive or reinstate the judgment.

7	85
11	559
7	85
13	141
7	85
15	574
7	85
4a	517
7	85
21	143
7	85
31	364

Appeal from District Court of Pueblo County.

Messrs. PATTON and URMY, for appellant, *ex parte*.

Per Curiam: The appeal in this case must be dismissed; it is an attempt to have reviewed here an order of the district court setting aside a previous order vacating a judgment.

It has frequently been held that no appeal lies to this court except from a final judgment or decree. *Higgins v. Brown et al.* 5 Col. 345; Laws 1879, p. 226, sec. 26.

In view of the theory upon which the court below

seems to have acted in granting this appeal, we venture a suggestion as to the *status* of the parties when the cause is remanded.

The judgment in question and the order vacating it were both entered at the same term. Courts have entire control over their judgments during the term at which the same are rendered; they possess a discretionary power to vacate and set them aside at such term, and their action in so doing is not subject to review in an appellate court. Freeman on Judgments, sec. 90, and cases cited.

We are of opinion that, however erroneous the action of the district court may have been in setting aside the judgment, the order effectively accomplished its purpose and vacated the same. When the court subsequently set aside this order, its action in so doing did not have the effect to revive or reinstate the judgment.

The appeal will be dismissed and the cause remanded, with leave to either party to move in the district court for final judgment.

Appeal dismissed.

7	86
2a	86
7	86
18a	296

STEVENS V. THE SOLID MULDOON PRINTING COMPANY.

A strict compliance with forms is not essential in the entry of judgments; yet to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as an entry of judgment.

Error to District Court of Ouray County.

Mr. THOMAS GEORGE, for plaintiff in error.

Messrs. MARKHAM and PATTERSON, Mr. WM. HARRISON and Mr. F. C. GOUDY, for defendant in error.

Per Curiam: The record in this case fails to disclose anything which, by the most liberal interpretation, can

be termed a final judgment. The nearest approach thereto is in the following language, viz.: "The court having heard the same, this motion was granted and the action dismissed at plaintiff's costs." This is a mere declaration that the action was dismissed at the plaintiff's costs; it does not profess to be a judgment, neither does it appear therefrom that it was intended to be such. "A strict compliance with forms is not essential in the entry of judgments; yet to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as an entry of judgment." *Alvord et al. v. McGaughey*, 5 Col. 244.

There being no final judgment to either affirm or reverse, the writ of error must be dismissed.

Writ dismissed.

ALDEN, IMPEADED, ETC., V. CARPENTER.

1. Where a defendant filed an affidavit in support of a motion for continuance on the ground of the absence of a witness, and the plaintiff offered to admit that the witness, if present, would swear to what was stated in the affidavit, and the motion being denied, *held*, not error.
2. Admitting the testimony of an absent witness in order to avoid a continuance is not to be taken as an admission of the truth of such testimony; nor does such admission preclude the party admitting it from rebutting the same on trial.
3. There is no such thing as a general denial in pleading under the code; a specific denial is required to each and every allegation in the complaint intended to be controverted. In an action on a promissory note it is proper to plead the want of consideration by specific averment, and in such case an issue is formed without a reply.
4. A mere irregularity in the order of proceeding in the trial court, and which could not have prejudiced the appellant, is not assignable for error.

Appeal from County Court of Pueblo County.

7	87
9	208
7	87
37	189

THE facts are stated in the opinion.

Mr. JOHN M. WALDRON and Mr. T. T. PLAYER, for appellant.

Messrs. PATTON and URMY, for appellee.

STONE, J. Appellee brought suit against the appellant, E. K. Alden, and one A. L. Price, upon a promissory note, of which the following is a copy:

"\$1,000. PUEBLO, COLORADO, January 5, 1882.

"One month after date, we, jointly and severally, promise to pay to the order of A. V. Carpenter one thousand dollars, without interest, at The Stockgrowers' National Bank. Value received.

"ALDEN & PRICE,

"E. K. ALDEN,

"A. L. PRICE."

The separate answer of Alden denies that he, or any authorized person for him, executed said note, and denies that the said note was executed and delivered to plaintiff by defendants.

The separate answer of Price alleges that the note was given without any good or valuable consideration whatever.

Defendant Alden filed an affidavit for continuance, on the ground of the absence of a certain witness, by whom he expected to prove that said defendant Alden "authorized said Price to sign a note for the indebtedness to plaintiff, on the express condition that the said note should contain a provision for its renewal at the option of defendants at maturity, and that this provision was afterwards omitted from the note when executed by said Price, as aforesaid, without said Alden's consent." The motion for continuance was argued by counsel and taken under advisement by the court, and afterwards, when the court was about to announce its decision granting the continuance, the plaintiff offered to admit that the witness,

if present, would swear to what was stated in the affidavit it was expected to be proved by him; whereupon, against the objection of defendant Alden, the court allowed the offer of plaintiff and denied the continuance. This ruling of the court was excepted to, and is made one of the grounds of error; counsel for appellant objecting that the offer of appellee was not made in apt time. We see no error in this ruling of the court. Such offer is a privilege of the party against whom the continuance is sought, and the allowance of the offer, as made, is within the discretion of the court, and we see no good reason why such discretion may not be exercised as well after the court has decided that the evidence is material, as when the motion is first made. It certainly would be unreasonable to expect that a party would admit the assumed testimony while he was at the same time contesting the insufficiency of the grounds for continuance. It is only when he knows that the continuance will otherwise be granted that such adverse party has any reason for admitting the supposed testimony sought by the continuance. The ruling of the court below was in accordance with the provisions of § 158 of the Civil Code practice.

Another point made by counsel for defendants is that the offer of plaintiff should have been to admit the truth of the supposed testimony, and not merely that the absent witness would swear to the same if present. For the same reason error is assigned to the ruling of the court in allowing plaintiff, on the trial, to introduce evidence contradicting the admitted testimony of the absent witness. There was no error in this. Admitting the testimony of an absent witness, in order to avoid a continuance of the cause, is not to be taken as an admission of the truth of such testimony; nor does such admission preclude the party admitting it from rebutting the same on the trial. *Boggs v. The M. N. Co.* 14 Cal. 358; *Blake-man v. Vallejo*, 15 Cal. 639; *O'Neil v. N. Y. etc. Co.* 3 Nev. 141; *State v. Geddis*, 42 Iowa, 264.

The principal authority cited in support of this assignment is the case of *Supervisors, etc. v. M. & W. Ry Co.* 21 Ill. 368, where the court below had held that such admitted testimony was liable to contradiction, and the supreme court, in passing upon the question, say: "We think, on principle, this view of the court was correct, as all parol testimony should be open to contradiction and to rebuttal; but this court having, at a very early day (*Willis v. The People*, 1 Scam. 402), established a different rule, * * * adhered to up to this time, we do not feel justified in disturbing it."

Another ground of error assigned is, that, since the plaintiff filed no reply to the separate answer of Price averring want of consideration for the making of the note, this averment must be taken as admitted to be true, and that, as such defense extended to both defendants, the plaintiff was not entitled to judgment.

Two questions arise upon this assignment: *First.* Could the defendant Alden, who, by his own plea, had merely denied the execution of the note, claim the benefit of this separate plea of the defendant Price? *Second.* Was this plea one which required a reply? As we think this last question must be answered in the negative, it is unnecessary to pass upon the first.

In *assumpsit* at common law evidence of the want of consideration for the contract declared upon was admissible under the general issue, and hence there was no necessity for the defendant's pleading it specially. The practice, however, under which almost everything had come by degrees to be allowed as a defense under the general issue in actions of *assumpsit* and debt, was materially changed by the rules of the English courts known as the Hilary Term Rules, under the statute of 4 Wm. 4, for the purpose of preventing an abuse, by which the plaintiff was frequently misled as to the special defense intended to be relied upon under the general issue; and for some such reason, probably, a statute of Illinois, under which decis-

ions are found, required a want of consideration, as well as a failure in whole or in part of the consideration, in that class of contracts upon which the forms of action referred to will lie, to be specially pleaded. The statute of Colorado of 1868, on the subject of bonds, bills and promissory notes (General Laws, § 97), provides that in actions upon notes, bonds, bills, etc., "it shall be lawful for the defendant, against whom such action shall have been commenced by the obligee or payee, to plead such want of consideration or that the consideration has wholly or in part failed;" with certain provisions as to *bona fide* assignees.

In New York it is held that evidence of payment, release, accord and satisfaction, and such like defenses, is not admissible under a general denial, but must be specially pleaded, and this ruling is put upon the ground that the general denial, under the code, is wholly unlike the general issue at common law. See the leading case of *McKyring v. Bull*, 18 N. Y. 297. In California, however, in a suit upon a promissory note, where the complaint averred that the note was unpaid, and that there was due upon it a specified sum, it has been held that evidence of payment is admissible under the general denial. *Devanny v. Eggenhoff*, 43 Cal. 395. This decision is based upon that in the case of *Frish v. Caler*, 21 Cal. 71, where the defense of payment was pleaded specifically, to which plea there was no replication; and upon the question whether the want of such replication admitted the plea, the court held that the plea amounted to a simple traverse of the averment in the complaint that the note was due and unpaid, and hence needed no replication. See, also, *McArdle v. McArdle*, 12 Minn. 98. The question respecting the office and scope of a general denial in code pleadings does not arise in the case before us, since there is no such thing as a general denial in the Colorado code, a specific denial being required to each and every allegation

in the complaint intended to be controverted. It was, therefore, proper, under the requirements of the code, and in accordance with the provisions of the statute before referred to, respecting suits upon bonds, bills and promissory notes, to plead the want of consideration by specific averment. But although an affirmative averment that the note was made "without any good or valuable consideration whatever," can it be taken to amount to more in effect than a simple traverse of the complaint. True it is not a denial of any specific allegation in the complaint, but the instrument in suit being one of a class which imports a legal consideration, *prima facie*, it was not necessary to aver the consideration in the complaint. The consideration of a contract is but the inducement for the obligation. It stands upon a different footing from a failure of consideration, which must always occur subsequent to the making of the contract, and which, if pleaded as a defense, may well be regarded as new matter in avoidance of the original cause of action, and calling for a reply. "If a cause of action has once accrued, or existed, and has been satisfied or defeated by reason of something which has occurred subsequently, that is new matter, which must be pleaded in order to render it competent as evidence." *Evans v. Williams*, 60 Barb. 346. In actions upon contracts which do not import a consideration, where the consideration must therefore appear in the complaint, a denial in the answer of such averment forms a complete issue, and hence needs no reply. Where the consideration is implied, as in this case, the implication stands in the place of the alleged consideration in the other class, and an answer averring want of consideration is, in effect, but a denial of this implication; hence no reason is perceived, upon principle, why, under such denial, as complete an issue is not formed in the one case as in the other.

In the one case the answer is a traverse of the ex-

pressed, and the other a traverse of the implied, consideration, and a replication would be merely "a traverse upon a traverse." Stephen on Pleading, 197.

In the case of *Goddard v. Fulton*, 21 Cal. 430, in construing the nature and effect of code pleadings in a case involving substantially the same question as the one before us, it was laid down that where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of the practice act, and therefore, where an answer to a complaint in the usual form on a promissory note admitted the making of the note, but averred that it was made, not on account of any indebtedness between the parties, but for the purpose of being used as collateral security for a debt due a third person from the maker and payee jointly; that the joint debt was subsequently paid, and that the note, having thus become *functus officio*, should have been canceled, but, through fraud, was taken and held by the payee, and by him transferred to the plaintiff without consideration, it was held by the supreme court of that state that these allegations in the answer were not new matter, which was admitted by a failure to reply; that their only effect was to deny that any obligation of the character stated in the complaint was ever created by the signing of the note, and thus to traverse its essential allegations. In other words, these averments of the answer were deemed to be a mere traverse of the implied consideration of the note sued upon. We are aware that in the numerous discussions of similar vexed questions arising upon the construction of pleadings under the code system, conflicting views are held by text writers and courts of different states, from some of which conclusions are found opposed to that reached by us upon the point under consideration; but upon both principle and authority we feel warranted in holding that the averment of the answer in question

amounts to no more than a denial or traverse of the obligatory character of the note as set out and counted upon in the complaint, and which needed no reply in order to form an issue, and a failure to reply was therefore no admission of the truth of such denial.

It is also assigned for error, that, pending the consideration of the court upon a motion made in the case, and which the court had taken under advisement until a subsequent day, said court allowed another case to be called up, heard the same and rendered judgment therein. This was no sufficient cause for assignment of error. It was at most a mere irregularity which could not have prejudiced the appellant in the least. The trial in this case was had to the court without the intervention of a jury, while the *ad interim* proceedings in the other case, as appears from the bill of exceptions and briefs of counsel, were for the purpose of decreeing a divorce between one George Cruming and Mary, his wife; a matter which was probably treated as of unusual importance, and the case possessing, we may suppose, some elements of urgency, since it occupied the attention of the court but a small part of one day. However much such irregularities in the mode and order of proceedings by a trial court are to be condemned, when they operate to delay pending trials or prejudice parties therein, they may at other times be inevitable, or even in furtherance of justice, but at all events, are matters of procedure within the sound discretion of the court, and not assignable for error fatal to a judgment rendered, unless an abuse is shown such as has prejudiced or deprived a party of some right affecting the fairness and verity of the judgment.

The foregoing are all the alleged errors that need be noticed. Judgment affirmed.

Affirmed.

SMITH V. ROE.

7	95
82	522

1. It is a familiar doctrine of the law of contracts, that, if one party is prevented from fully performing his contract by the fault of the other party, the latter cannot be allowed to take advantage of his own wrong to exempt himself from liability under the contract.
2. Objection on the ground of variance between the complaint and the proof comes too late when made for the first time in this court.

Appeal from District Court of Dolores County.

THE facts are stated in the opinion.

Mr. L. V. ROSSER and Messrs. STALLCUP, LUTHE & SHAFFORTH, for appellant.

Mr. FRANK W. INGERSOLL, for appellee.

STONE, J. Suit was brought in the court below by appellee to recover the sum of \$1,000, upon an alleged contract for services in negotiating the sale of certain mining claims of appellant. The complaint alleged that in February, 1880, the appellant, Smith, agreed with the appellee, Roe, that if said Roe would assist in the sale of four certain mines, he (Smith) would, in case said mines were sold on or before the 15th day of May, 1880, pay to said Roe \$250 for each of said mines so sold before said 15th day of May; and that Smith then and there made and delivered to Roe four checks on the M. & M. Bank, at Ouray, the payment of each conditioned, as therein expressed, on the sale of one of the four mines named, on or before the date aforesaid; that Roe, in pursuance of this contract, had the mines bonded to one Suydam, for conveyance of the property to Suydam, on condition that the latter pay to Smith \$4,000 therefor, on or before May 15, 1880, which bonds were duly recorded, and by Roe forwarded to Suydam, in New York, together with reports and statements concerning the property; that afterwards, in March, the said property was sold by

Suydam, under the said bonds, to one Parrish of New York, for the sum of \$4,000, and that afterwards, on the 28th of April, Smith made and delivered a deed of the property to Parrish, and received the said sum of \$4,000, and that thereupon said Roe demanded payment of the checks aforesaid, but that Smith refused to pay the same, or any part thereof, wherefore said Roe sues, etc.

The answer of appellant denied each and every allegation of the complaint, without setting up any new matter.

The case was tried to the court without a jury, and resulted in a finding and judgment for appellee, the plaintiff below, in the sum of \$50, which judgment the appellant, Smith, asks this court to reverse on the ground that it is against the weight of evidence, and further, that the evidence wholly fails to support the judgment, for the reason that, under the pleadings, there could be no recovery, except upon the contract declared upon in the complaint; whereas the judgment was as upon a *quantum meruit*, which was not pleaded in the action.

The facts which appear to be established by the evidence are that in February, 1880, Smith executed four bonds for the sale of four mines specified, at the price of \$1,000 each, the bonds running to one Suydam, and the property to be sold by the 15th of May, 1880; deeds for the conveyance of the property were also made and deposited in escrow, and the memorandum checks, as set out in the complaint, were also made by Smith and delivered to Roe, together with the bonds. These bonds were recorded in the proper county, and were then forwarded by Roe to Suydam in New York, together with reports, etc., as to the property; that through the acts and representations of Roe, Mr. Suydam was induced to come out from New York to examine the property, with the view of purchasing it; that after his arrival in April, he learned in some way that he could buy the property, by dealing with the owner (Smith) directly, at a less price,

and therefore refused to take the property of Roe at the price of \$4,000 fixed in the bonds; that Smith, without the knowledge or consent of Roe, gave a power of attorney to one Butler to sell the same property; that Butler thereupon went to Suydam and offered the property for \$2,000, which offer Suydam accepted, and, as he himself testified, "for fear there was something wrong," paid Butler \$1,000 down upon the spot, and took a deed from Butler therefor, which sum was paid over to Smith by Butler; this occurred on April 28, 1880; that owing to some supposed defect in the power of attorney, Suydam afterwards demanded another deed from Smith direct, but, after the deed was offered, refused, for some reason, to accept it, refused to pay any more money thereon, and that seems to have been the end of the transaction between Smith and Suydam. Afterwards, however, a deed of the same property from Smith to one Parrish, of New York, for whom it appears Suydam was buying the property, was made and put upon record, in which deed the price of the property, as the consideration for the deed, is expressed to be \$4,000. There was some conflict between the testimony of Smith and that of Roe respecting the transaction of Smith with Suydam, but the testimony of Suydam appears candid throughout, and he states that he bargained with Smith through Butler simply because he learned that he could buy it for one-half the amount named in the bonds of Smith to him through Roe. Roe testified that in case of a sale of the mines within the time stipulated, Smith was to pay him \$1,000, or \$250 for each mine so sold, as specified in the memorandum checks, regardless of the price at which the mines were sold. Smith, in his testimony denied this, and stated that he was himself to receive \$2,000 for all of the four mines, or \$500 for each, and that it was understood between all parties in interest, that all over \$2,000 received from the sale should go to Roe and one Hyland, who was co-operating with Roe, and to whom

also four conditional checks were given by Smith, aggregating \$1,000, of the same tenor as those given to Roe, but that it was agreed to try to sell at \$4,000, and not at a greater price, and that the property was, therefore, bonded to Suydam for this price. This certainly seems the most reasonable construction to put upon the agreement, considering both the facts which were admitted and those which were disputed, for it is difficult to believe, upon the whole evidence, that Smith agreed to give the \$2,000 commission to Roe and Hyland, and at the same time agreed that the property might be sold at any price whatever, and considering also that it is further offered in testimony that Butler was a party in interest in the property with Smith, and was entitled to one-half of the price that Smith was to receive.

That there was a failure to make the sale in accordance with the original agreement is evident, but that such failure may have been due to the conduct of Smith is equally evident. It is not disputed that Roe performed all the services that he was required and expected to do, under the agreement, in furtherance of the sale, and that the payment of the \$1,000 to Smith, under the sale, such as it was, by Smith to Suydam through Butler, was brought about primarily by means of the previous efforts of Roe. And it cannot be said that the sale might not have been made by Roe under his agreement therefor, had he been allowed by Smith the full time stipulated by that agreement in which to make the sale. It appears from the testimony of Suydam, that soon after he arrived upon the ground to examine the property, he learned that by dealing directly with Smith he could buy the property for less than the price at which it had been bonded to Roe, and this resulted in Smith offering it, through Butler, for \$2,000, that sum being the amount Smith was to receive under his agreement with Roe. It seems an attempt on the part of Smith to facilitate a sale by underbidding his own agent (Roe), and getting his

own half of the agreed price, leaving Roe without any commission for his services in procuring a purchaser. At least this action of Smith's was a violation of his agreement with Roe, who was thus cut off from a chance of making the sale within the time allowed him by the agreement; and we may fairly presume that if allowed the full time conditioned in the agreement, Roe might have sold the property, either to the purchaser in hand or to some other purchaser, within that time, and for the price named in the bond, in which case he would be entitled to the specific sum sued for. It is a familiar doctrine of the law of contracts, that if one party is prevented from fully performing his contract by the fault of the other party, the latter cannot be allowed to take advantage of his own wrong to exempt himself from liability under the contract. But since the appellee (Roe) is not finding fault with the judgment of the court below, we have only to deal with the objections to the judgment as coming from Smith, the appellant, and upon his part we think there is no good ground for reversal. He admitted, in his testimony, the services of Roe in the transaction, and that he (Smith) had offered to pay Roe \$50 as compensation for such services, and we presume this admission was the basis of the amount found by the court in favor of the appellee. However incorrect this was as a basis for the judgment, in so far as it relates to the appellee, yet in respect to the appellant, the latter has no just cause of complaint that the judgment against him is for a less sum than the amount sued for, or that he would be liable for under a *quantum meruit*.

So far as the record shows, he made no objection to a variance between the complaint and the proof in the court below, where, under §§ 77 and 78 of the code, an amendment, if necessary and proper, might have been made to cure the objection, nor is it pretended that appellant was misled by such variance. In such case, the objection is too late when made for the first time in this

100 NEW YORK & BROOKLYN M. CO. V. GILL. [Dec. T.,
 court. *Sussendorff v. Schmidt et al.* 55 N. Y. 319.
 There have been two trials of the case below, resulting
 in a judgment substantially the same in both, and no
 sufficient reason appearing for disturbing the judgment
 herein questioned, it will be affirmed.

Affirmed.

THE NEW YORK AND BROOKLYN MINING COMPANY V.
 GILL.

Errors in the service of summons by publication may be waived by
 the appearance and answer of defendant to the merits.

Appeal from District Court of Summit County.

THE grounds of the motion to quash the service in the
 court below were:

"*First.* For the reason that the affidavit upon which
 said order was made is not nor was not sufficient to
 authorize the clerk to make said order of publication.

"*Second.* That said order is not in accordance with
 sections 41 and 42 of the Code of Civil Procedure of the
 state of Colorado.

"*Third.* That from said order it does not appear that
 the same was signed or issued either by the clerk of the
 court or any of his deputies, or under the seal of this
 court."

Messrs. ABBETT and BULLIS and Mr. M. B. CARPENTER,
 for appellant.

Messrs. MULLAHAY, LIPSCOMB and F. M. HARDEN-
 BROOK, for appellee.

BECK, C. J. The appellant company was defendant
 below, and by its counsel moved the district court to
 quash the service of the summons, which was by publi-
 cation. This motion was denied. The answer of said

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20	32
7	100
23	599
7	100
25	504

company was thereupon filed, and a trial of the issues had before a jury, resulting in a verdict and judgment for the appellee, from which judgment the said company have prosecuted this appeal.

All the errors assigned relate to the refusal of the court below to quash the service of the summons.

The alleged errors were all waived by the appearance and answer of the defendant company.

The judgment is therefore affirmed with costs. Judgment affirmed.

Affirmed.

WILSON ET AL. V. THE DENVER, SOUTH PARK & PACIFIC
RAILROAD COMPANY.

Where a complaint alleges that the obstruction on the track, which caused the injury complained of, was on the track by negligence of the company, and that deceased was, at the time, in the discharge of his duty, exercising due care and skill, a demurrer will not lie.

Error to District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

Messrs. BROWNE & PUTNAM, for plaintiffs in error.

Messrs. TELLER & ORAHOD, for defendants in error.

BECK, C. J. The amended complaint in this case was held insufficient, upon demurrer in the district court, and the plaintiffs declining to amend further, judgment was given for the defendant, the said railroad company.

The complaint charges that the accident, which is the ground of the action, occurred by reason of the engine on defendant's railroad coming in contact with a log lying across and upon the track of said railroad, at or near Deansbury station, whereby the engine was thrown from the track into the river adjacent, and the deceased

7	101
9	162
7	101
7a	123
7	101
23	450
7	101
81	808
7	101
e20a	79

thereby instantly killed. It alleges that the deceased was in the employ of the railroad company as a fireman upon said engine, but at the time of the accident, by request of the engineer, he was running the engine, and was doing so with due care and skill. That the accident occurred while the deceased was in the discharge of his duty, and that it did not occur by reason of any want of skill or care on the part of the engineer in charge of the engine, or of the deceased, but on account of the negligence of the defendant, alleging, in this connection, "that said log was on and across said track by reason of the negligence of defendant."

The complaint then alleges that a fire had been raging for the space of twenty-four hours immediately preceding the accident in a dense growth of pine timber, on either side of the track, near the scene of the accident, and that, several hours before the accident, defendant was notified of the fire, and that in consequence thereof, trees were liable to fall upon and obstruct the track; but that defendant neglected to take any precautions to give notice of danger, or to remove obstructions, and that the accident occurred in consequence of said negligence of the defendant, and not otherwise.

It is not alleged specifically that the log got upon the track by reason of the fire, and in this particular the complaint is imperfect and liable to criticism. We are of opinion, however, that this defect was not properly reached by the demurrer. A demurrer admits all facts well pleaded, and there are sufficient facts well pleaded in this complaint to constitute a cause of action, and to require an answer from the defendant.

The allegations of the employment of the deceased by the defendant; that at the time of the accident he was in the discharge of his duty; that the accident did not occur by reason of negligence or want of care or skill on the part of either the engineer in charge of the engine, or of the deceased, but that it did occur in conse-

quence of the negligence of the defendant in failing to keep its track free from obstruction at the point mentioned, are statements of fact which present an issue. Such issue cannot be met by a demurrer; certainly not by the demurrer filed therein, the grounds of which are substantially as follows:

First. That deceased was out of the line of his duty as fireman, without the knowledge or consent of the defendant, at the time of the accident.

Second. It is not alleged that any officer or agent of the defendant, whose duty it was to look after the railroad and guard against obstructions, was notified of any danger from falling timber at the place where the accident occurred.

Third. The complaint shows that defendant did not have notice of any danger likely to arise from falling timber.

Fourth. The complaint does not state facts sufficient to constitute a cause of action.

Courts have held, when negligence has been alleged in general terms, that while the pleading is not for this cause obnoxious to a demurrer, yet if the plaintiff possesses more specific information, he may be required, on motion, to make his complaint more definite and certain.

Fitts, Adm'r, v. Waldeck, imp. 51 Wis. 569; *Hayden v. Anderson*, 17 Iowa, 162; *The O. & M. Railway Co. v. Collarn*, 73 Ind. 265; *Railway Co. v. Lavally*, 36 Ohio St. 225.

It is a duty which railroad companies owe to their employees, to keep the tracks of their railways free from obstructions that would endanger the lives of the latter. This duty is not absolute, but has its limitations, which are clearly stated by Mr. Justice Elbert in *Colorado Central Ry v. Ogden*, 3 Col. 510.

The learned judge says: "The company must use all reasonable precautions and care to secure the safety of its employees, by keeping the roadway in repair. It cannot,

through want of watchfulness, expose them to unreasonable risks in this respect and escape liability, but the duty imposed is that of ordinary care. This ordinary care must be measured by the danger of the service, and proportioned to it. Considering the dangerous force which a railway company puts in motion, the term 'ordinary care toward its employees' imposes, without doubt, a high degree of diligence in keeping the road and all its appliances in proper repair, but it neither warrants nor insures against defects."

While the mere fact that an injury to an employee was occasioned by an obstruction of the track does not make out a *prima facie* case of liability against the railroad company, yet when, as in the present instance, it is further alleged that the obstruction was upon the track by reason of the negligence of the company, and that the employee was in the discharge of his duty, and exercising due care and skill, at the time the injury was received, such allegations do constitute *prima facie* a case of liability against the railroad company.

The late Chief Justice Breese, in commenting upon the liability of railway companies to their employees, upon a review of authorities said: "The result of which rulings is, not to hold these companies as insurers that their road and appurtenances and instrumentalities are safe and in good condition, but that they must do all that human care and vigilance and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition and to keep them so. * * * On the other hand, they are not answerable for latent defects in materials employed in the construction of their machinery, which the usual and well recognized tests of science and art afford for the purpose, but fail to detect; nor are they liable for accidents occurring, by which injury ensues, when skill and experience are not able to foresee and avoid them." *T., P. & W. Ry Co. v. Conroy*, 68 Ill. 567-8.

One of the principal objections urged in this court to the complaint is that the charge of negligence made against the railway company is not sufficient to admit proof of facts fixing the liability of the defendant, for the reason that it is not alleged that notice of the danger to be apprehended was given to the person or officer whose duty it was to oversee and provide against obstructions. This position is not maintainable. The charge of negligence is made directly against the defendant, and the effect of the demurrer is to admit that the obstruction which caused the death of the deceased was upon the track by reason of the defendant's negligence.

In *Hildebrand, Adm'r, v. The Toledo, etc. R'y Co.* 47 Ind. 406, the court say: "The counsel on both sides have filed long, able and searching briefs. The brief on behalf of the appellee is chiefly confined to the question of the liability of the company for the negligence of its servants, by which a co-servant was injured or killed; but we think this is not the case made by the first and third paragraphs of the complaint, as they directly charge negligence against the defendant itself. This is admitted by the demurrer, and we think that no authority can be found where negligence has been directly charged against the defendant, that a demurrer for want of sufficient facts has been sustained. How this charge may be avoided by an answer or the evidence is not before us, but only as to whether these paragraphs of the complaint, all allegations therein being admitted by the demurrer, required an answer. We hold that these paragraphs of the complaint required an answer."

In 2 Thompson on Negligence, p. 1246, it is said that negligence on the part of the defendant is the gist of the action, and must be charged in the plaintiff's petition, but that an allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient. See, also, pp. 1248 and 1254, *id.*, and *Grinde v. The M. & St. P. R'y Co.* 42 Iowa, 376.

It is clear, from the principles announced and authorities cited, that the following further objections to the complaint, made by counsel for defendant in error, are not available under this demurrer, viz.: That sufficient time had not elapsed, after notice of the fire, for defendant to have provided a guard at that place, either to give notice of danger or remove obstruction; that it does not show how long such obstruction had been on the track, or that defendant knew, or ought to have known, it was on the track; that it does not allege when such notice was had upon the defendant, nor upon what officer or agent of the company, nor how the tree got upon the track.

Chief Justice Breese, in *T., P. & W. R'y Co. v. Conroy*, 68 Ill. 569, in speaking of the strong obligation resting on railroad companies to use all reasonable means to acquire knowledge of the condition of their roads, says: "The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires. And further, it is their duty to keep a sufficient force at command, and of capacity sufficient to discover defects and apply the remedy. Neglecting to keep it in the best condition, if injury occurs thereby, the companies will be liable, and they ought to be so liable. From this responsibility they cannot be relieved except by showing that the defect was one which could not be discerned or remedied by any reasonable skill or foresight."

Such is the state of the law upon pleadings of this character, and we must hold that as against the demurrer filed the complaint is sufficient. The defendant may have a perfect defense to the action, but, if so, the facts constituting such defense must be pleaded.

The judgment is reversed and the cause remanded.

Reversed.

EMERY v. YOUNT.

1. A court of equity will not interfere to set aside a conveyance on the ground of fraud, at the suit of a general judgment creditor, where the debtor has other property subject to execution; and, in such case, a bill which fails by proper averment to allege insolvency, or facts sufficient to indicate that the judgment cannot be collected without equitable aid, is fatally defective; and the defect is not cured by evidence of insolvency.
2. Before a court of equity is authorized to cancel a voluntary conveyance on the ground of fraud upon the creditors of the grantor, it must be alleged and proved that debts existed at the time the conveyance was made, or that it was executed with a view to the creation of future obligations.
3. In such case the question, going to the sufficiency of the facts alleged to constitute a cause of action, can be raised at any time.
4. Proceeding by attachment is in the nature of a proceeding *in rem*, and the attaching creditor acquires a specific lien upon the property attached. This lien cannot be destroyed, except by dissolution of the attachment or some default of the attaching creditor.
5. Such lien is not merged in the judgment rendered in the action, in aid of which the attachment was sued out, until the transcript of the judgment docket has been filed for record in the office of the recorder, since no judgment lien exists until that is done.
6. In case of such attachment lien, where conveyance was made subsequent thereto, an averment of insolvency is not necessary in suit to cancel the conveyance; for though the debtor may be abundantly able to satisfy the judgment, he will not be permitted by fraudulent conveyance to defeat or destroy the specific attachment lien of the creditor. The latter may invoke the aid of equity to remove the obstruction from the way of the enforcement of his lien, without resorting to an execution or other legal remedy.

Error to County Court of Larimer County.

THE facts are stated in the opinion.

Messrs. TILFORD and GILMORE, for plaintiff in error —
ex parte.

HELM, J. This is an equitable action brought by Ella B. Yount, a judgment creditor of defendant George A. Emery, against him and others, for the purpose of sub-

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11	100
7	107
12	114
12	564
7	107
7a	506
7	107
9a	300
9a	476
7	107
24	222
7	107
18a	519
7	107
e33	62
7	107
35	152

jecting certain real estate to the satisfaction of her judgment. Plaintiff's theory is that a deed to one of the parcels of land was procured by said Emery to be executed to his wife, a co-defendant herein, for the purpose of defrauding his creditors, and that he himself assigned a title bond to the other tract to his mother, another co-defendant, with like intent.

The complaint substantially prays that said deed be canceled, and the lots conveyed to Mary Emery be subjected to the payment of plaintiff's judgment; also that plaintiff be awarded the benefit of a specific lien upon the lots covered by the title bond, by virtue of her judgment aforesaid, and a writ of attachment levied thereon in aid of her suit before the assignment of said title bond.

The defense is that Emery's wife advanced the purchase money from her own funds, and purchased the property, and took the deed in good faith, and that his mother was the real owner of the title bond, before and at the time of the levy of said attachment writ; that Emery was merely a trustee for her benefit, and that the assignment was made in good faith, and in execution of the trust.

The questions of fraud involved in the case were submitted to a jury, who found that both transactions were had with the intent of defrauding Emery's creditors. A decree in favor of plaintiff was entered upon these findings.

The complaint nowhere alleges that said defendant Emery is insolvent, or that he has not other property amply sufficient to satisfy plaintiff's judgment. It does not even aver that an execution had ever been issued upon said judgment, or that any effort of any kind had ever been made to procure satisfaction thereof; the only allegation on this subject is that the judgment "still remains unsatisfied, in whole or in part."

The *evidence* shows that an execution was issued upon

said judgment, and returned "unsatisfied." Aside from this, there is nothing in the record bearing upon defendant George A. Emery's financial condition, save a declaration made by himself to one of the witnesses, that he had "plenty of property to pay the note," meaning the note upon which said judgment was afterwards rendered.

The doctrine is settled that a court of equity will not interfere to set aside a conveyance on the ground of fraud, at the suit of a general judgment creditor, where the debtor has other property subject to execution, sufficient to satisfy the judgment. And therefore it has become an established rule of pleading, that the bill must, by proper averment, allege insolvency, or facts sufficient to indicate that the judgment cannot be collected without equitable aid; failing to do this, it is fatally defective. And the defect is not cured even in cases where evidence is received fully establishing the insolvency of the judgment debtor. The averment is material, and a decree upon proofs, without the necessary allegation, is error; for "the defendant cannot be required to meet and overcome evidence not responsive to the pleadings." *Thomas v. Mackey et al.* 3 Col. 393; *Burdsell v. Waggoner et al.* 4 Col. 259. A failure to state in the complaint facts sufficient to constitute a cause of action may be taken advantage of at any time. Code of Procedure, § 56.

Another valid objection urged against the complaint in this case is its failure to aver that plaintiff, or any one else, was a creditor of defendant Emery at the time the alleged conveyance to his wife was executed. Before a court of equity is authorized to cancel a voluntary conveyance on the ground of fraud upon creditors, it must be alleged and proven that debts existed at the time the conveyance is made; or that it was executed with a view to the contracting of future obligations. *Sexton v. Wheaton*, 8 Wheat. 229.

These principles of pleading are decisive of the case, so far as the deed to Mary Emery is concerned, and would

terminate our investigation were it not for a complication arising from the levy of plaintiff's attachment writ upon the property afterwards conveyed to Mrs. A. S. Emery. The equitable interest of the latter in the premises, if any she had, did not appear of record; and there is nothing to show that plaintiff had any notice thereof until the assignment of the title bond.

The proceeding by attachment is in the nature of proceeding *in rem*, and the attaching creditor acquires a specific lien upon the property attached; he is not in the attitude of a mere creditor at large. This lien cannot be destroyed except by dissolution of the attachment, or by some default of the attaching creditor. See Drake on Attachments, §§ 225, 224, and cases cited. And, unless a merger takes place, it remains in full force and effect.

But it is contended by counsel for plaintiff in error, that defendant in error is entitled to no special advantage from the levy of her writ of attachment; because — counsel argue — the lien acquired thereby was merged in her judgment; she has secured no judgment lien upon the premises, and therefore no specific lien upon the same can be recognized. In this state a levy and sale under execution may be made under a judgment as soon as rendered; but the judgment itself constitutes no lien upon realty until a transcript of the judgment docket is filed with the recorder of the proper county. The attachment lien does not merge in the judgment, as contended by counsel; no merger takes place until a judgment *lien* exists. Therefore, with us, there is no merger of the attachment lien until a transcript of the judgment docket is duly filed as aforesaid.

No time is *limited* by law for the filing of such transcript, and it is optional with the creditor to do so or not. If he takes advantage of the statute and records, he obtains a judgment lien upon *all* the realty of the debtor not exempt from execution, unattached as well as attached; this lien takes precedence over subsequent pur-

chases or incumbrances thereof; if he does not record, the rights of *bona fide* purchasers or incumbrancers of the debtor's realty, prior to execution levy thereon, are in no way affected by his judgment.

We do not decide how long this attachment lien upon realty would hold good, nor how soon the attachment creditor should move to subject the property to the satisfaction of his judgment. When a transcript of the judgment docket is filed with the recorder, the lien secured is good for six years, whether execution issue or not. Session Laws 1879, § 16, p. 223. And it may be that in cases like this, where the creditor secures no judgment lien upon all the debtor's realty, his attachment lien upon a specific portion thereof would be held to survive for the same period. In this case, however, these questions are not presented because there was no delay; this action was begun within six weeks after judgment in the original suit.

Plaintiff's attachment lien did not merge because she never filed a transcript of the judgment docket, and never acquired a judgment lien. It is still in force, and she is entitled to the benefit thereof. No hardship will result in other cases from the application of the rule we thus recognize and adopt, for by our statute an attachment of realty is secured by the sheriff's filing with the county recorder a copy of the writ and description of the property attached (Code, § 96); and this record is notice to all the world of the attachment lien acquired thereby; it informs parties dealing with the debtor of the creditor's claim upon the property, quite as effectively as does the filing of a transcript of the judgment docket.

Defendant in error is then in the attitude of a judgment creditor, having a specific lien upon a particular tract of land, asking equitable relief against a subsequent fraudulent conveyance of the same. She demands that such conveyance be declared void as to her, and that, to the extent of her lien upon the property, her right to ob-

tain satisfaction of the judgment therefrom be recognized and enforced.

For this purpose we think the pleadings sufficient; the issue as to a fraudulent assignment of the title bond is made by the answer and replication, and supports the verdict of the jury. To recover upon this branch of the case, an averment of the debtor's insolvency was unnecessary; the reasons for that averment by one who is only a general judgment creditor do not control. The debtor may be abundantly able to satisfy the judgment; yet he shall not, by a fraudulent transfer of property, be permitted to defeat or destroy a specific lien acquired thereon before such transfer thereof. And the creditor shall not be required to wait, after obtaining judgment, till he levies his execution upon the property so conveyed, or files a transcript of the judgment docket with the recorder, before invoking the aid of a court of equity to remove the obstruction of the fraudulent conveyance. He may first remove this obstruction so that the property under his execution levy and sale will bring a fair price, and in a measure, at least, satisfy the judgment.

It is unnecessary for us to consider the assignments of error not covered by the foregoing discussion and conclusions. The decree of the county court will be modified in accordance with the views herein expressed. The costs of these proceedings in error will be equally divided between the parties; the balance of costs will be paid by plaintiff in error, according to terms of former decree.

Decree modified.

THE CITY OF DENVER V. BAYER.

1. Abutting lot owners have a peculiar interest in the street not shared by others. Their easement is property within the meaning of our constitution, and any interference therewith which results in injury will (with certain exceptions) be justly compensated — there being a *damaging*, if not a *taking*, of private property. Whatever interference with the street permanently diminishes the value of their premises is as much a damage as though caused by direct physical injury thereto.
2. But sometimes these interferences and the resulting injury may properly, even in this state, be held to be *damnum absque injuria* — as where they are occasioned by a reasonable improvement of the street by the proper authorities for the greater convenience of the public; or where a temporary inconvenience or injury results from a legitimate use thereof by the public. In purchasing his lot or dedicating the easement to the public, the abutting owner is conclusively presumed to have contemplated the power and authority of the city council to skilfully make reasonable changes and improvements, by raising or lowering the grade, or otherwise. But these presumptions attach only when the purpose of the change is to render the street more convenient and useful as a public highway.
3. While it may be said that bridges, culverts, and even street railways, are matters contemplated by the lot owner when he purchases, no such presumption applies to the use of the street by an ordinary railroad.
4. For any injury and annoyance occasioned by such railroad, which are peculiar to an abutting owner, and not shared by the general public — which affect his property and impair its value without injuring that of his neighbor, — he ought to receive compensation, though the city hold the fee and grant the right of way.
5. If the city by ordinance only gives consent on behalf of the corporation and the public that the street may be used by a railroad, the city would not be liable; and if it was intended by the ordinance to confer upon the railroad company a right to use the street without compensation to adjoining owners, where permanent injury resulted from such use, the ordinance is, in this respect, *ultra vires* and void. The relation of principal and agent does not exist in such case.
6. For injuries of this kind a single recovery can be had for the whole damage to result from the act. The measure of compensation (in suit between the proper parties) is the actual diminution in the market value of the premises, for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street.

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10	106
10	374
10	415
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13	508
13	509
7	118
M	389
7	118
15	195
7	118
18	125
1a	154
1a	388
7	118
19	288
7	118
20	17
7	118
27	280
7	118
30	109
36	115
36	116
36	117
36	112

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. STALLCUP, LUTHE and SHAFROTH, Mr. J. P. BROCKWAY and Mr. J. A. DAWSON, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

HELM, J. Plaintiff below seeks to recover in this action for the obstruction of free ingress and egress to and from his lots, by means of the streets upon which they front, and for a depreciation in the value of his property, caused by the construction and operation upon the street of the railroad mentioned in the pleadings.

Three questions are fairly presented for adjudication by the record before us:

First. Is the abutting lot owner in this state entitled to compensation when the adjoining street is occupied by an ordinary railroad, and his property is thereby injured? *Second.* If he is, did the city of Denver become liable therefor through the action of its council in passing the ordinance recited in the answer? *Third.* If the adjacent proprietor is entitled to compensation, what is the proper measure of damages by which the same shall be determined?

The abutting lot owner has a peculiar interest in the street. He has rights therein not shared by the general public. If the fee thereof be in the municipality, he owns an easement therein. This easement or right, though incorporeal and intangible, often gives to the realty whatever value it may be found to possess; without it, the land and the improvements thereon may be of little use or benefit; with it, they may yield to the owner a handsome revenue. This is especially true of business streets and business blocks erected thereon.

Property, in its broader and more appropriate sense, is

not alone the chattel or the land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible. The people and the courts of Colorado are constantly treating as property the right to a use of water acquired by priority of appropriation. The right of user would, of course, be of no value without the water; but it is this right that is mainly the subject of ownership.

Incorporeal hereditaments, particularly those denominated easements, have always been considered property, both by the civil and the common law. They are generally attached to things corporeal, and are said to "issue out of or concern" them; but any wrongful interference therewith has been promptly recognized and punished by the courts.

No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our constitution, and any interference therewith, which results in injury to the realty, must, with the exceptions hereinafter stated, be justly compensated; if in such a case there be no technical "taking" of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon.

But sometimes these interferences and resulting injury may properly, even in this state, be held to be *damnum absque injuria*; as where they are occasioned by a reasonable improvement of the street by the proper authority for the greater convenience of the public, or where a

mere temporary inconvenience or injury results from a legitimate use thereof by the public.

The streets of a municipal corporation are highways. They are dedicated to the use of the general public, and it has a right therein in the nature of an easement—a right which is termed an easement by some of the authorities. Whether the fee thereof be in the city or in the adjoining owner, this right of the public ordinarily remains the same; if in the former, such fee is generally in trust for the benefit of the public; if in the latter, it is subject to the right of user or enjoyment by the public for all the ordinary and legitimate purposes of a highway. With us the control thereof is, in either case, vested by law in the municipal government. It is the duty of the city council to protect and improve the same in such manner as will render it most useful for a highway. In determining what changes and improvements are most conducive to this end, the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises through the unskilfulness or negligence of those employed, the owner thereof will not be heard to complain, though, in fact, the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof.

But it must be borne in mind that these presumptions attach only so long as the purpose of the change is to render the street more convenient and useful as a highway. When this object is abandoned, and the council direct or permit a change or use wholly foreign to the ordinary purposes of a highway, and when thereby adjacent property is actually damaged, the owner thereof is, in this state, entitled to reasonable compensation for the injury.

The abutting owner may well be presumed to have taken into consideration the fact that the grade of the street might be raised or lowered, that pavements might be laid and bridges and culverts constructed, and that a street railroad even might be built and operated thereon; and it may fairly be presumed that in purchasing he anticipated and allowed for the possible or probable damages to result from these and similar changes, or that he signified his consent thereto, and thus deprived himself of any right to compensation therefor.

But no such presumption, consent or estoppel applies to the use of the street by an ordinary railroad. The argument that such a railroad is an improved public highway, and therefore its construction and operation in the street is only an improved and appropriate use thereof, we do not regard as resting either upon correct principle or sound logic.

The street is designed for local convenience and use, and is dedicated thereto; it should be entirely unobstructed, save as temporary obstructions occur in the improvement thereof by the proper authorities, or in its legitimate use by the public.

An ordinary railroad is not a local convenience; the city is but one of its termini; its cars do not stop at the beck of any one who may wish to ride, and do not commonly transport passengers from one point to another within the city; its ties and rails, as generally laid, are a permanent interference with the use of the street for ordinary vehicles; the smoke and dust, interruption and noise produced by operating its trains are a perpetual annoyance, and the danger a constant menace, in the occupation and enjoyment thereof for the usual purposes.

We cannot escape the conclusion that such a railroad is an additional burden or servitude not comprehended within the easement for an ordinary public street or highway; a burden or servitude which the abutting owner cannot be presumed to have anticipated or consented to.

The railroad is a public benefit. It is generally of great advantage to the town or city to or through which it is built and operated, and for any injury or annoyance occasioned thereby which an adjoining owner shares in common with the general public, he ought not to recover; but for those damages which are peculiar to him, which affect his property and impair its value without injuring that of his neighbor, he ought, in justice, to receive compensation.

We are aware that upon some of these questions the courts are by no means in accord. Our views conflict with the decisions of courts for whom we entertain the profoundest respect. But while this want of harmony is to be regretted, it cannot be avoided, for agreement with all the able decisions is impossible. No attempt has been made to review, in this opinion, the cases; the task would be too long and laborious. We have not stated exhaustively the reasons controlling the views adopted upon this branch of the case, nor shall we undertake to do so. There are, however, a few subjects and decisions which we feel called upon to more specifically consider.

A distinction has sometimes been made with reference to the *fee* of the highway. The doctrine is announced, and supported by a strong preponderance of authority, that if the fee of the street be in the public, or in the municipality for the use of the public, the legislature may authorize it to be used for the construction and operation of a railroad, without compensation to the adjoining property owner, and against his wishes. And, of course, the legislature may delegate to the municipal authorities power to grant the same privilege, with like immunity from liability to lot owners along the street occupied. See the following works and the cases cited therein: 2 Dillon, Munic. Corp. § 556; Mills on Em. Domain, § 203; Cooley's Const. Lim. p. 687 (5th ed.).

We are not, as may at first seem, ignoring this doctrine, or necessarily denying its correctness under the law

prevailing where it has been declared. A careful examination shows that almost without exception those decisions which consider the subject and deny a right to compensation for injury where the abutting owner does not also own the fee of the street, were rendered under constitutions which require compensation only for the *taking* private property. And a majority of those opinions are largely devoted to analyzing the word *taken*, and to defining its meaning as used in their respective constitutions.

The constitution of Colorado contains the following provision: "Private property shall not be taken *or damaged* for public *or private* use without just compensation."

We believe that the framers of this instrument did not insert the words "or damaged" therein without a purpose. We cannot consent to the proposition that these words add nothing to the word *taken*, also used, and that the provision would be just as broad without them. It is hardly necessary to invoke the canon of construction which forbids that we shall consider them as either meaningless or merely cumulative.

The position taken in some of the cases is, that if the adjoining owner have not the fee of the street, and the value of his property be diminished fifty per cent. by the construction of a railroad therein, he has no redress; while if he be the fortunate owner of this fee, he may recover not only for the taking or appropriation of the street, but also for the interference with his easement, and the *decrease occasioned in the value* of his premises.

Yet whether he own the fee or not, his rights in connection with the street, while it remains a street, are practically the same. His possession of this fee in no special way contributes to the use or enjoyment of his lot, and enables him to exercise no greater control over the street than he would have without it.

This distinction as to the fee seems to rest upon the

fact that in one case there is a *wrongful incumbrance* of his *freehold*, while in the other there is not. The actual injury inflicted is about the same in both. But while, if the fee vests in the city, there may be no wrongful incumbrance of his *estate*, in the sense of these cases, there is, under our constitution, at least a damaging thereof, for which he is entitled to compensation.

Constitutional provisions, where only the *taking* of private property is to be compensated, have frequently been held to include any "direct physical obstruction or injury" to the abutting premises, even though there be no actual appropriation of the ground itself; as where, by excavation or embankment, water was caused to overflow the same; a kind or class of injuries for which, in the absence of constitutional or statutory enactment, a remedy existed at common law. *The Toledo, Wabash & Western R'y Co. v. Morrison*, 71 Ill. 616; *Hooker v. The New Haven & N. H. Company*, 14 Conn. 146; *Pumpey v. Green Bay Co.* 13 Wall. 166.

We think this construction of the provision eminently reasonable and just. Accepting it as correct, we are forced to draw the inference that the words "*or damaged*" with us were intended to reach still another class of injuries. To this class belong, in our judgment, those complained of in the case at bar. Upon this subject see *Gottschalk v. C., B. & Q. R. R. Co.* (S. C. Nebraska) No. 13, vol. 16, Reporter, 402; also *Transportation Co. v. Chicago*, 99 United States, and other cases hereinafter considered.

There has heretofore been no interpretation of our constitutional provision, by this court, with reference to damages such as those complained of in the case before us.

The rights of the parties in *Colo. Cent. R. R. v. Molandin*, 4 Col. 154, accrued prior to the adoption of that instrument; and for this reason, although the decision was rendered subsequent thereto, no mention was made,

or discussion had, of the constitutional inhibition. But § 48 of chapter 18, Revised Statutes of 1868, provides that private property shall not be "taken or *injuriously affected*" without compensation. This statute remained in force till 1876, and it may be urged that the decision in the Molandin case above mentioned was governed thereby.

We may admit that the words of the statute "injuriously affected" are as comprehensive in meaning as the word "damaged" used in the constitution, and yet not be concluded by the foregoing decision. The statute was not relied upon or discussed in that case; not a word appears in the opinion itself, nor in the briefs and arguments of counsel, to show that it was even remotely considered. The opinion of a court is not decisive of a question not mentioned therein, although the same might have been passed upon. It is generally a party's privilege to waive a statutory right, and courts, particularly those of last resort, do not, as a rule, press upon litigants the benefit of a right or privilege which they have elected not to invoke or claim.

Had the court been called upon for a construction of that statute, it is probable that a view would have been adopted similar to the one here announced as to our constitutional provision.

The sixty-eighth section of the "Land Clauses Consolidation Act," 8 and 9 Vict. ch. 18, contains the following language: "If any party shall be entitled to any compensation in respect to any lands or any interest therein, which shall have been taken for or *injuriously affected* by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," such compensation was to be determined as in the act provided.

It will be observed that this section contains the words "taken" and "injuriously affected," used in our statute

of 1868, and it is not improbable that these words were borrowed, either directly or indirectly, from § 68 aforesaid, or from some other English act using them in the same connection.

The English courts, in interpreting this statute, have usually (not always) held that the words "injuriously affected" only allow compensation where a right of action would have existed at common law; yet in their application of this construction they have been extremely liberal, sometimes declaring that actionable at common law which we generally do not so consider.

In *McCarthy v. Metropolitan Board of Works*, 7 L. R. C. P. 508, the action was brought to recover for the depreciation in value occasioned to plaintiff's premises by the stopping up and destruction of a certain dock near the same. "Plaintiff had no right or easement in the dock other than his right as one of the public, nor was there appurtenant or otherwise belonging to plaintiff's premises any easement or privilege in or to the dock." But by reason of their proximity thereto, there being only a narrow street between, the buildings were rendered valuable either to sell or occupy; and by the destruction thereof they were permanently damaged and diminished in value.

The court, per Willis, J., says: "Notwithstanding the striking differences of opinion which have been expressed upon this subject, I cannot entertain the slightest doubt that what was done here was an *injurious affecting* of the plaintiff's property, which would have given him a cause of action before the statute, and which entitles him to compensation under § 68." The plaintiff's recovery of £1,900 was sustained.

In *The East and West India Docks v. Gattke*, 3 McN. & G. Reports, 154, defendant professed to have "incurred great pecuniary loss and damage by reason of the construction of the plaintiff's railway in the immediate

vicinity of his premises." He claimed compensation under said act on the ground that his property was *injuriously affected*.

The lord chancellor declines to maintain an injunction preventing defendant's proceeding by suit to collect damages for the injury. His lordship suggests that under this statute a party is entitled to compensation where his lands are not "taken, used, or directly interfered with," but where there is a "consequential" injury, resulting in the actual depreciation of the value thereof.

Beckett v. Midland R'y Co. 3 L. R. C. P. 82, was a case where the highway, fifty feet wide, in front of plaintiff's premises, was narrowed by means of a railroad embankment to thirty-three feet in width. Plaintiff claimed, among other things, that by the embankment and narrowing of the road, the value of his property was reduced.

Boville, C. J., speaking of the property being injuriously affected, under said § 68, says: "I am also of opinion that, but for the act of parliament which authorized the making of the railway and the narrowing of the road, an action might have been maintained by the plaintiff for such injury, and that he is entitled to claim compensation under the provisions of the act I have referred to." And Willis, J.: "I am of the same opinion. * * * It must be conceded that there was a damage to the owner of the house from the narrowing of the road in front of it. It is not worth so much to sell or let as it was before. I will not cite authorities upon a matter which is so plain."

The learned judge who delivers the opinion in *Rigney v. The City of Chicago*, 102 Ill. 64, formulates the rule deducible from the foregoing and other cases, in the following language: If "there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and [if] by reason

of such disturbance he has sustained special damage with respect to his property, in excess of that sustained by the public generally," the common law would, but for some legislative enactment, afford him redress. A recovery was sustained where the injury resulted from the construction, without negligence, through the public street, of a viaduct by the municipal authorities.

It is immaterial whether or not we declare the English rule thus formulated in Illinois sufficiently broad to recognize a right of action at common law in cases like this; for whether we so conclude, and say with these English cases, interpreting words similar in meaning to those of our constitution, that such language only gives a right to recover where it would have existed at common law, or whether we interpret the provision of our constitution, as did Lord Westbury the English statute, as recognizing a new right of action, the result is the same; in either event, parties are entitled to compensation for such injuries as are here complained of.

Lord Westbury, in the case of *Ricket v. Directors of Metropolitan R'y Co.* 2 L. R. Eng. and Irish Appeals, 175, questions the correctness of the above rule, as applied to the English statute, in the following vigorous language: "If this view be correct, it follows that it is a mistake to lay down, as I find it in several cases, and, in effect, in the judgment of four judges in this case, that the injury intended by the words *injuriously affected* must be one of which, if there had been no statute enabling the company to do the act, an action would have lain for the injury at common law." And again, he says: "When, therefore, the general railway acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully' or 'unlawfully;' nor does it imply that compensation is limited to cases where the act done is such as, but for the powers given, would be a *tort* at common law. The words mean 'damnously' affected only. * * *

There is nothing in the statutes to warrant the position

that there shall be no compensation where at common law there would have been no right of action."

In *Transportation Co. v. Chicago*, 99 U. S. 635, the court, in speaking of the constitution of Illinois of 1870, says: "It ordains that private property shall not be taken *or damaged* for public use without just compensation. This is an *extension* of the common provision for the protection of private property."

The following cases were decided under constitutional inhibitions similar to ours in this respect; and they assume, without discussion, that the words *or damaged*, thus used, are the recognition, by their respective constitutions, of a new right of recovery. They do not limit such right to cases where an action would, without the constitutional provision, have lain at common law. *Williams v. G., C. & S. F. R'y*, vol. 1, No. 34, *Denver Law Journal*, 267; *Graves v. G., C. & S. F. R'y*, 1 *Texas Law Review*, 8; *Johnson v. Parkersburg*, 16 *West Va.* 402; *Moore v. City of Atlanta*, vol. 1, No. 10, *Denver Law Journal*, 78; *City of Atlanta v. Greene* (Sup. Ct. Ga. Sept. Term, 1881); *City of Elgin v. Eaton*, 83 *Ill.* 535.

The two Texas cases, *i. e.*, those of *Williams* and *Graves*, above mentioned, were brought to recover for injuries from the use of the street by a railroad. The others were against the cities for damages caused in grading the streets by their respective councils. The right to recover compensation was sustained in all.

As will be observed, we do not go so far as some of these cases. That our position might not be misunderstood, we have, at the risk of being charged with *obiter dictum*, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street, by the council, in a careful manner, the abutting owner should not recover.

We now proceed to consider the liability of the city, in this case, for such compensation. The ordinance before

us might, perhaps, be construed as in no way undertaking to compromise the right of adjoining owners, in cases like this, to compensation, but simply as granting a license, on behalf of the public and the city government, to occupy the street in question; we might possibly regard it as merely a declaration that both the city government and the general public consented to such use of the street, and would interpose no objection or obstacle thereto. To this extent the council had power to act; beyond this it could not go. Under such a view of the ordinance, no one would contend for a moment that the action against the city could be maintained.

On the other hand, if the ordinance in question was intended to confer upon the company a right to use the street for railroad purposes without compensation to the adjoining owners, where permanent injury resulted from the use, it is in this respect an effort to authorize something expressly forbidden by the constitution. The act of the council was a clear usurpation of power not possessed. The ordinance, in so far as it denies the right to compensation, is *ultra vires* and void. We find no statutory provision authorizing such action by the city council, and if such a statute existed it would also be void.

But if the city council assume, or attempt to assume, powers not conferred, their action is not binding upon the corporation. 2 Dillon, Mun. Corp. §§ 767, 768, 563, and cases cited. Certainly a municipal corporation cannot be bound by the action of its council sanctioning or attempting to sanction a disobedience of law.

The case of *Stack v. The City of East St. Louis*, 85 Ill. 377, cited by counsel, might possibly be thought to recognize a right of recovery in a case like this, upon the doctrine of principal and agent. But we cannot realize the fitness of this application of the rule of agency. If the city council determine to make some change in the street for the benefit of the public, and proceed to do the work, the contractors or employees would be the city's

agents; for injuries arising from their unskilfulness or negligence, the municipality would unquestionably be liable. But the construction of an ordinary railroad is not, as we have found, an improvement of the street for the convenience and benefit of the local public; it is a private enterprise, for private profit. True, the city attaches certain conditions to the license granted, such as that the road-bed shall be upon a certain grade, that culverts shall be constructed for the gutters, and planks laid at the crossings; but otherwise the municipal authorities do not control the enterprise. Whether we term the railroad company purely a private, or whether we call it a *quasi* public corporation, the situation remains unchanged. In constructing and operating the road, it is acting for itself and not for the city. It is no more the city's agent than is the individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobey the law in building or operating its road, the city is no more responsible therefor than it would be for a *tort* of the private individual in the pursuit of his business aforesaid.

The remaining question to be passed upon refers to the measure of damages adopted by the court in admitting testimony and in charging the jury.

Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit, in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent.

After thorough examination of the cases, we are of opinion that the following rule is just and equitable, and that it is sanctioned by the weight of authority: When the action is against the proper party, and the plaintiff is entitled to recover, the measure of his compensation is the actual diminution in the market value of his premises, for any use to which they may reasonably be put,

occasioned by the construction and operation of the railroad through the adjacent street.

The jury must not, of course, consider any fluctuations in value resulting from other causes, no personal inconvenience or annoyance, no interference with his trade or business, no decrease in the rental value of his premises, occasioned by the construction or operation of the railroad, and no temporary interruption or damage thereby constitutes the test. None of these things can enter into the question, except as they may appropriately aid in determining the actual depreciation in market value of the realty and improvements.

If, by reason of the proximity of the railroad thereto, plaintiff's property is in any way peculiarly benefited, that is, if he experiences a benefit therefrom not shared generally by the property owners of the city, such benefit should be considered, and the value thereof allowed in determining the amount of his compensation.

The judgment will be reversed and the cause remanded, with directions to the district court to dismiss the action.

Reversed.

MANVILLE V. PARKS ET AL.

7	128
7	150
9	48
7	128
14	364
7	128
15	576
7	128
17	397
17	527
7	128
22	49
7a	340
7	128
11a	499

1. A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine, and may exist as well where the parties have an interest merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself.
2. A partnership may be implied from the acts of the parties, as well as by express intent and agreement.
3. While the members of mining partnerships may not possess implied authority to bind the company by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines.

4. The authority of each partner to bind the other is an implied one, and, as between the partners themselves, there may exist, by express agreement, a limitation upon the general implied authority; but third persons dealing with the firm, without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business.
5. The taking a default against a defendant upon failure to plead is a privilege of the plaintiff, and, if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain.
6. There is no difference in principle between a final judgment against a defendant in default for failure to answer and a judgment against defendant *nil dicit*.

Error to County Court of Lake County.

THE facts are stated in the opinion.

Mr. LOUIS BRANSON, for plaintiff in error.

Messrs. R. D. THOMPSON, W. H. NASH and T. A. DICKSON, for defendant in error.

STONE, J. The plaintiff Manville sued the defendants to recover the price of certain goods sold and delivered, for which the complaint alleged a joint and several promise to pay on the part of defendants. Two of the defendants, Parks and Yates, answered on their own behalf, denying the sale and delivery to them, and denying any promise to pay by them or either of them. The defendant Smith filed a separate answer, denying the sale and delivery, and denying a promise to pay by all or any of the defendants of the sum alleged to be due. The other two defendants, Bush and Henderson, filed no answer.

The testimony brought up by the record discloses the following facts: Bush proposed to Parks and Yates that they go into a mining operation together to make some money. Parks and Yates knew that one Brandon had a mine, one-half interest in which could be secured to develop and purchase, whereby money could be made if it turned out well, and it was proposed that Parks and

Yates make the necessary arrangement with Brandon for this purpose. Accordingly, Parks and Yates made a preliminary arrangement with Brandon, and afterwards a meeting was had at the office of Parks and Yates, in Leadville, where were present Brandon, Parks and Yates, Bush, and Smith, and Henderson, at which meeting an agreement was made, and a bond for a deed of a one-half interest in the mine in question — called the Tip Top mine — was executed, giving the defendants the privilege of working the mine for ninety days, with the option of purchase within that time. The several interests which the parties were to have in the mine were agreed upon and mentioned in the bond. A day or two afterwards, this bond was taken up by agreement of the parties, and a deed in lieu thereof was executed by Brandon, which was deposited in escrow, conditioned, like the bond, for payment of the agreed price of the half interest in the mine within ninety days, during which time the grantees were to have possession for the purpose of working and development, for taking out ore which should be found therein. The grantees named in the deed were Bush, Smith, Henderson, and Parks and Yates, and the interest of each respectively was expressed as in the bond previously.

This matter being arranged, it was proposed by Bush that Henderson take charge of the mine as manager or foreman and prosecute work thereon, and no one objecting to such proposition, it was assented to, and accordingly Henderson immediately employed men, purchased the necessary supplies of tools, etc., and prosecuted work on the mine for two or three months.

Parks and Yates both testified that, by an understanding between them and Bush, they were to pay no money for their interest in the mine, nor for working the same, but that such interest was paid for by their legal services in procuring the contract with Brandon, drawing up the papers, etc., and that they had not paid nor been called

on to pay a dollar in money for such interest, or for working the mine.

Henderson testified that he was to be allowed \$5 per day for his services in superintending the work, and that these wages were to apply in payment of his share in the mine. He also testified that Smith furnished \$120 towards the expenses of the work, and that Bush furnished all the rest of the money that was paid on account of such expenses.

In pursuance of his authority as manager or foreman of the working of the mine, Henderson purchased of the plaintiff certain supplies, consisting of tools, powder and fuse for blasting, etc., necessary for working the mine, which goods were so purchased by Henderson on behalf of the parties interested, and were sold by the plaintiff, as testified to by him, on the credit of said parties, Henderson informing him, at the time of the purchase, who the parties in interest were, and naming each of the defendants as partners in the enterprise. Plaintiff knew the defendants personally, and Bush was present with Henderson when some of the purchases were made in the store of plaintiff. Henderson testified that he knew nothing of any understanding that Parks and Yates were to pay no part of the expenses, as testified to by them, and the plaintiff had no knowledge or notice of such fact or condition until after the controversy arose respecting payment for the goods purchased from him by Henderson on behalf of all the defendants.

The county court, which tried the case without the intervention of a jury, found as follows: "*First*, that from the evidence it is not shown that the said defendants ever entered into a mining copartnership for the purpose of working, carrying on or developing the said Tip Top mine; *second*, that the defendants never gave the said Henderson any authority to purchase the said goods from the plaintiff in their names, and that in fact said Henderson never had any authority in law or fact to

purchase said goods or any part of the same, or to bind them in any way or manner for the price and value of said goods, or any part of the same; and *third*, that the said defendants are entitled, under the facts proven and the law, to a judgment against the plaintiff for their costs in this action by them paid, laid out and expended, and that the plaintiff take nothing by this action."

Judgment was rendered in accordance with these findings, and the principal question to be determined upon the errors assigned is a mixed question of law and fact. Were the findings and judgment in accordance with law, under the state of facts disclosed by the evidence?

The case was tried below, and is argued here, upon the theory that the liability of the defendants depends upon whether the relation existing between them, in respect to the mine and its working, constituted a partnership. In *Charles v. Eschelman*, 5 Col. 106, it is said that "A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine," and the court then proceeds to point out some of the differences between a mining partnership and an ordinary trading partnership; but we apprehend that this language of the court, while applicable to the case before it, was not intended to restrict the definition of such partnerships solely to cases where a mine is owned by the parties working it, for it is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself. Indeed, in the cases where the question of mining partnership first arose in the English courts, it was doubted whether the joint, or joint and several, owners of mines, who combined to realize and enjoy the profits of the estate under a general system of management, should be considered other than joint tenants, or tenants in common of the land, not subject to the laws of partnership; while, on the other hand, a combination for the working

of mines merely, or as a paramount object, and trading and dealing in the products, would constitute a partnership for such purpose. But these views were subsequently modified, so that for many years both English and American authorities have held that co-tenant owners, as well as lessees or parties having only equitable interests in the property, or holding under license to work or develop, or where the owner furnishes the mine and another the capital and labor under an agreement to share the profits of the mine jointly, in all such cases there may be a partnership for mining purposes.

For a concise review of rules and decisions upon this subject, see Rockwell on Mines, chapter V, and the case of *Skillman v. Lachman*, 23 Cal. 290, and where, as also in the case of *Charles v. Eschelman*, 5 Col., the distinguishing differences between mining and ordinary partnerships are pointed out. Whether a partnership exists, is a question of fact; what a partnership is, is a question of law. Parsons on Part. p. 7. We think the facts in this case fairly establish the relation of partnership between the defendants, with respect to the mining operations for the carrying on of which the debt here sued for was contracted. It was one of those mining partnerships, so common in this country, formed for the purpose of carrying on mining operations in a particular adventure, combining some of the incidents of an ordinary partnership, and some of the incidents of a tenancy in common. *Settembre v. Putnam*, 30 Cal. 493. To the extent of their interest in the property they were tenants in common, and in the working of the mine they are to be considered as partners. *Dougherty v. Creary*, 30 Cal. 300; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 200. Upon the contract with the owner of the mine, the defendants had an option of the property in which the respective interests of each were defined and understood, while the working of the mine was for their joint benefit and profit, establishing such a

community of interest in the adventure as constitutes a mining partnership. Parsons on Partnership, § 67; *Duryea v. Burt*, *supra*. Mr. Parks himself testifies that the bond was to purchase the property, and contained a condition "that Mr. Bush and his party desired to purchase the property, and were purchasing it *to take out mineral*, and it run for sixty or ninety days or more *for working the property*, and pay money for the mine." Mr. Yates, in his testimony, says: "Mr. Bush inquired of Mr. Brandon about the working of the mine, and Mr. Brandon explained to Bush exactly how the mine ought to be worked; that there ought to be a tunnel run to connect with a certain shaft on the hill, and Bush and Brandon settled the thing finally." Yates further stated, on cross-examination, "that the matter of working the mine was perfectly understood; that Bush and Henderson made the office of Parks and Yates their headquarters; that he, Yates, frequently inquired of Henderson how the mine was getting along; that he made such inquiries on account of his interest in the mine." We think this and the other testimony in the case upon this point fully establishes the fact that there was a joint interest and co-operation of all the defendants in the working of the mine, and such interest and co-operation constitutes a mining partnership.

"A partnership may be implied from the acts of the parties, as well as by express intent and agreement. It is not necessary that the intention of being partners should be expressed in words, for the law supplies the want of these words." Parsons on Part. 87. And even though parties may not intend to become partners, yet, if they enter into such business relations and carry on such acts as in law constitutes a partnership, they are no less partners than if they had fully intended to become such. *Id.* 86. In seeking to establish a partnership relation, it is a rule of evidence that less strictness of evidence is required where partners are sued than

where they themselves sue as such. Greenleaf's Ev. § 483.

And while the members of these mining partnerships may not possess implied authority to bind the company or firm by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines. *Skillman v. Lachman, supra.*

In this case the articles purchased of the plaintiff were essential to the carrying on of the business and the accomplishment of the purpose of defendants in working the mine, and the debt being created in the necessary and usual course of the business, and within the scope of the partnership adventure, the individual member who made the purchase had lawful authority to contract the debt and to bind his copartners thereby.

The general principle which lies at the foundation of a partner's liability is that every partner has full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. Parsons on Partnership, § 95.

This rule rests upon the doctrine of principal and agent, and indeed it may be said that partnerships are but modified forms of the relation of principal and agent.

Aside from the differences which exist between a mining partnership and an ordinary commercial partnership, none of which are involved in this case, the principles and rules of law applicable to the latter also govern the former. Hence, the defendant Henderson did not require special or express authority from the other partners in order to bind them in the purchase of the goods from the

plaintiff. His authority, implied by the law of agency, arising out of the partnership relation between the defendants, was ample. True, this authority of each partner to bind the others is an implied one, and, as between the partners themselves, there may exist by express agreement a limitation upon the general implied authority; but third persons, dealing with the firm without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business. Parsons on Partnership, § 95.

Hence, it is no defense, in this case, that it was agreed between the partners, if such be the fact, that the defendants, Parks and Yates, were not to be chargeable with the expenses of the business beyond their contribution of legal services as claimed, for however binding this might operate upon the partners *inter se*, it could not affect the plaintiff, who dealt with them without any notice of restriction upon the individual liability of particular members. Parsons on Partnership, §§ 94, 130; *Wood & Oliver v. Velletts et al.* 7 O. St. 172; *Burgam v. Lyall et al.* 2 Mich. 102; *Lyall & Taller v. Sanbourn*, *id.* 109; *Fisher v. Bowles*, 20 Ill. 396; Greenleaf's Evidence, § 481, and cases cited.

As is said in *Winship v. Bank of U. S.* 5 Pet. 561, "It is usual to buy and sell on credit, and if this be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely, if ever, seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct

the usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps, never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law. None of the defendants, in their answers, set up a special partnership or averred any limitation of liability as partners, and hence evidence of any such restriction was inadmissible. To render such evidence admissible, it was essential to plead such limitation, and also aver notice thereof to the plaintiff previous to the purchase of the goods. *Greenleaf's Evidence*, § 485; *Lomme v. Kintzig*, 1 Mont. 295.

Upon the uncontradicted evidence in the case, both the partnership of all the defendants and their liability, as such, to the plaintiff for the amount claimed, were established as conclusions of law, and the plaintiff was entitled to the judgment demanded.

Another question presented relates to the subject of default. It is argued by counsel for defendants that no judgment could have been properly rendered against those defendants who failed to answer, for the reason that a default was not first taken against them for failure to answer. We do not regard this as a valid objection. The default could as well be recited and entered at the time of the rendition of final judgment as before. The taking of a default against a defendant upon failure to plead is a privilege of the plaintiff, and if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain. The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment. *Drake v. Davenick*, 45 Cal. 455.

There is no difference in principle between a final judgment against a defendant in default for failure to answer

and a judgment against a defendant *nil dicit*. And it has been held that, where a final judgment has been rendered against one who was in default, the taking of a default, "if it was essential to the orderly conduct of the proceedings," will be presumed when the contrary does not appear. *Miller v. Miller*, 33 Cal. 353.

Under common law practice the summons first issued, and the declaration was not filed until the first day of the ensuing term, or, under our former practice, ten days before the term, and on appearance defendant answered only when he was ruled so to do by order of the court. Under the code practice, the conditions of the default are prescribed by statute. If the plaintiff fails to take a default before trial, this is a favor to defendant, of which he cannot complain or reap advantage. The validity of a judgment upon trial had cannot be made to rest upon a withholding by the plaintiff of a favor to defendant, or a waiver of a statutory privilege.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HUGHES V. CUMMINGS ET AL.

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1. Under section 75 of the code, a county court may reinstate a cause after the expiration of the term at which it was dismissed, and a district court has no power, in a collateral proceeding, to pass upon the validity of an order made by the county judge reinstating a cause upon the docket of the county court.
2. A county court does not lose its jurisdiction of its judgment in a cause appealed thereto from a justice of the peace upon the filing and recording a transcript of the judgment rendered by the justice in the office of the clerk of the district court.
3. The jurisdiction of a county court must, in a collateral proceeding, be tested by its own record.

Error to District Court of Clear Creek County.

Mr. C. C. POST and Mr. W. T. HUGHES, for plaintiff in error.

Mr. R. S. MORRISON, for defendant in error.

BECK, C. J. The controlling question presented by this record is, whether the district court had the power, in a collateral proceeding, to pass upon the validity of an order made by the county judge, reinstating a certain cause upon the docket of the county court.

If the district court did not possess such power, it is immaterial, so far as the present action is concerned, whether the action of the county judge was erroneous or otherwise; for if erroneous, the error can only be corrected in a direct proceeding.

This is an action upon an appeal bond, executed by the defendants in error to perfect an appeal from a judgment of a justice of the peace, to the county court. One Henry B. Beighley recovered a judgment, before the magistrate, for the sum of \$200, and costs of suit, against the defendant in error, Owen Cummings. From this judgment Cummings took an appeal to the county court, but failing to prosecute his appeal, it was dismissed for want of prosecution and for failure of the appellant to comply with a rule entered against him by the county court, requiring payment of certain costs.

The complaint in the present action avers that said judgment was assigned by the plaintiff Beighley to Hughes, the plaintiff in error, on the same day on which the appeal was dismissed.

The defendants in error set out in their answer, by way of abatement of this action upon the appeal bond, an order of the county judge reinstating the appeal upon the docket of the county court, alleging, in this connection, that there was no final judgment in the cause so appealed, but that the same is still pending and undetermined in said county court.

Plaintiff in error replied, averring, among other mat-

ters, that he is and has been the sole and exclusive owner of the judgment from the day of the dismissal of the appeal, and that neither he nor said Beighley had notice of the institution of proceedings to reinstate the appeal. To this replication the district court sustained a demurrer, and gave judgment that the defendants go without day. This being a collateral action, the ruling of the district court was correct, unless it appears from the records of the county court that the latter court acted without jurisdiction in reinstating the appeal. If the county court can be said to have acted within its jurisdiction, the district court had no power to either revise or nullify its action.

The order was made by the county judge at chambers, seventeen days after the adjournment of the term at which the appeal was dismissed.

Statutory authority for such an order is found in § 75 of the Code of Civil Procedure (1877), which provides, among other things, that "the court may, * * * upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term."

The rule applicable to the judgments and orders of courts of general jurisdiction is stated to be, that, in collateral actions, when the record discloses nothing to the contrary, jurisdiction over the person as well as the subject-matter will always be presumed. Wells on the Jurisdiction of Courts, §§ 32, 37; *Baker v. Champlin*, 12

Iowa, 204; *Housh v. The People*, 66 Ill. 181; *Wenner v. Thornton*, 98 Ill. 168.

In the leading case of *Peacock v. Bell*, 1 Saund. 74, the rule is thus stated: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged."

This general rule, as qualified by the supreme court of the United States in *Galpin v. Page*, 18 Wall. 365, is, "that a superior court of general jurisdiction, proceeding within the scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant, or his appearance in the action. But when the former exists, the latter will be presumed." This rule has been held applicable to the county courts of this state, by former decisions of this court. *Martin v. Force*, 3 Col. 199; *Gomer v. Chaffee*, 5 Col. 383.

The order of the county judge reinstating the appeal is set out in the record before us, and while it does not show affirmatively that the requisite notice was given, we are not advised that the records of that court contain anything to the contrary. The county court clearly had jurisdiction of the subject-matter, and in a collateral proceeding it must be presumed to have had jurisdiction of the parties also.

The position of the plaintiff in error, based upon de-

cisions of the supreme court of California, on a statute essentially different from our own, that jurisdiction to set aside a judgment, or to reinstate a cause, ceases at the close of the term, cannot be entertained without wilfully ignoring the statute above cited. Equally untenable is the proposition that the county court lost jurisdiction over its judgment upon the filing and recording a transcript of the judgment rendered by the justice of the peace, in the office of the clerk of the district court. The statute which authorizes such transcript to be so filed and recorded specifies when and for what purpose the same may be done, viz.: When the defendant has not sufficient personal property to satisfy the judgment, and the plaintiff desires to have the same levied upon real property.

It is for this purpose that a judgment of a justice of the peace is given the effect of a judgment of the district court.

In respect to the point raised by the plaintiff in error, that when a judgment has been assigned it cannot be legally vacated without notice to the assignee, it is only necessary to say the point is not available in the present action. The jurisdiction of the county court must be tested by its own record in collateral actions, and cannot be impeached by allegation merely. It does not even appear that there was any record in said court of the assignment of the judgment, nor does it appear that the court had any knowledge of the assignment.

Whatever relief the plaintiff in error may be entitled to receive must be sought in a direct proceeding to review the rulings and judgment of the county court. Judgment affirmed.

Affirmed.

THE DENVER, WESTERN & PACIFIC R'Y Co. v. CHURCH.

1. In a proceeding under a statute affording a provisional remedy for a special purpose, the same principles must apply which are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of jurisdiction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action.
2. In such case the costs *held* to be rightfully taxed against the party bringing the action in the county court when it might have been brought and determined in the district court, which had concurrent and unlimited jurisdiction in such cases.

Appeal from County Court of Jefferson County.

THE facts are stated in the opinion.

Messrs. CHARLES and DILLON, for appellant.

Mr. G. B. REED, for appellee.

STONE, J. The appellant filed its petition in the county court of Jefferson county, praying a condemnation for right of way for its road through certain lands of the appellee, under the provisions of the statute in that behalf. In order to bring the proceedings within the limited jurisdiction of the court, the petition contained the necessary averment that the amount of compensation and damages to be ascertained for the right of way aforesaid would not exceed the sum of \$2,000.

A jury of freeholders having been demanded by the appellee, was impaneled and sworn, and said jury, having examined the premises, returned a finding and verdict into court that the value of the land taken by the petitioner was \$444.07½, and that the damages to the residue of the land was \$2,700, amounting altogether to \$3,144.07½, and that the benefit to the property by reason of the construction of said road was nothing. There-

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upon appellant moved that the verdict be set aside, and a new trial granted.

After argument and consideration of the motion, the court set aside the verdict, refused a new trial, and dismissed the proceedings at the cost of the petitioner. From this judgment the petitioner appealed to this court, and assigns for error: *First*. The refusal of proper testimony. *Second*. The admission of improper testimony. *Third*. The overruling the motion for new trial. *Fourth*. The dismissal of the cause and the judgment for costs against the appellant.

The errors relating to the testimony we have no means of examining into, since no testimony whatever is presented in the abstract of the record, nor any exceptions thereto, nor rulings nor instructions of the court thereon, nor is any question arising upon these assignments discussed in the briefs filed.

The third and fourth grounds of error may be considered together.

It is insisted by counsel for appellant, that the averments of the petition filed in the proceeding presented a case within the jurisdiction of the court, and that "the jurisdiction or power of the court to hear and determine a cause is invoked by the allegations of the petition, complaint or claim filed in the cause, and that it is the duty of the court to hear and finally determine such cause in the exercise of the jurisdiction so acquired."

The first part of this proposition is undoubtedly true, but the latter part is correct only as a general rule; and an exception to such rule is necessarily created where, pending the proceedings prior to final judgment, some fact or matter arises judicially, which discloses that the apparent jurisdiction of the court, up to that time, no longer exists. This is illustrated in actions in justices' courts relating to real estate, where, when it is made to appear, pending the proceeding, that the title or boundaries are in dispute, or that the value of the property in

controversy is in excess of the jurisdiction of the court, the proceedings are by statutory provisions suspended, and the cause certified to the district court. Or, take an action in replevin in a justice's or county court; the plaintiff may in his complaint allege the value of the property to be within the jurisdiction of such court, yet if, in the course of the proceedings, it should appear that the actual value of the property, at the time the action was brought, was greater than the amount of which such court had jurisdiction, this fact would operate to divest the court of the apparent jurisdiction of the subject-matter, which up to that stage of the case had been rightfully assumed.

Now, in these statutory proceedings for condemnation of land for right of way or other authorized purposes, while the value of the land to be taken can be estimated with approximate certainty before the commencement of the proceeding, the damages which are to be awarded, if found to accrue, are likely to be very differently estimated by the parties to the proceeding, and can be actually determined only by judicial ascertainment; this, together with the compensation for the land taken, being one of the main objects of the proceeding.

In these cases the nominal plaintiff is, in a certain sense, the real defendant, who goes into court to ask for an ascertainment and adjudication of how much he shall pay to the nominal defendant. And in such cases, the plaintiff, if he brings his proceeding in a court of limited jurisdiction, takes the risk of an award which will oust the court of jurisdiction to proceed further than such ascertainment.

It is contended by counsel for appellant, in the argument filed, that since the petition, when filed, disclosed a case within the jurisdiction of the court, it was error to dismiss the case "upon extraneous matters outside the record;" and to avoid the effect of the verdict, which certainly became a part of the record as soon as entered,

upon the rendition thereof. Counsel further argue, that, "upon setting aside the verdict, the jurisdiction of the court became perfect and complete, as shown by the record, and it then became the duty of the court, in the exercise of the jurisdiction averred in the petition, to grant a new trial and hear and determine the cause."

This contention of counsel, while plausible as thus stated, we think is manifestly unsound.

As appears by the record of the ruling of the court upon the motion to set aside the verdict and for new trial, and the judgment of dismissal, the verdict in this case was not set aside because it was a result of passion or prejudice of jurors, nor because the amount of damages and compensation awarded was larger than warranted by the evidence; on the contrary, the record expressly shows that the court regarded the verdict as a reasonable determination of the amount to be awarded, and dismissed the action because the excess of jurisdiction was thereby disclosed; and the setting aside the verdict, for whatever reason it was done, as a prelude to the dismissal, did not avoid the jurisdictional fact disclosed by the recorded verdict.

While this proceeding is a statutory one, to afford a provisional remedy for a special purpose, the same principles must apply to it which are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of such jurisdiction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action. The case of *The Louisville, N. A. & Chicago R'y Co. v. Johnson*, 67 Ind. 546, is analogous in principle. Suit was brought to recover the value of an animal killed by the cars of the railway company, under a statute which provided that such actions should be brought in justices' courts, unless the value

of the animal exceeded \$50, in which case they should be brought in the court of common pleas or in the circuit court.

The action was commenced in the circuit court upon a complaint alleging the value of the animal to be \$60. The jury returned a verdict of \$47 as the fair market value of the animal killed. A motion to dismiss was overruled, and, upon appeal to the supreme court, it was held that the value of the animal, as a criterion of the jurisdiction of the court, was to be determined, not by the value alleged in the complaint upon which jurisdiction properly attached in the first instance, but by the real value as found by the court or jury upon trial; and that, therefore, when, upon the trial, the fact was judicially shown by the verdict that the case was not within the jurisdiction of the court, there was no authority to proceed further therein, but that the court should have dismissed it.

In the case at bar the costs, upon dismissal, were properly taxed to the petitioner company, which brought the action in the county court at its own risk, when it might have been brought and determined in the district court, which has concurrent and unlimited jurisdiction in such cases.

There being no error in the judgment appealed from, it will be affirmed.

Judgment affirmed.

COFFMAN ET AL. V. BROWN.

Where an amount is acknowledged in the pleadings to be due plaintiff, it is error to find a verdict or render a judgment for a less amount than that admitted by the pleadings.

Appeal from District Court of San Juan County.

THE case is stated in the opinion.

Messrs. HUDSON and SLAYMAKER and Messrs. C. M. FRAZIER and M. B. CARPENTER, for appellants — *ex parte*.

Per Curiam: There is some conflict in the evidence as to the exact date when the partnership of appellants was formed. But the cause was tried to a jury, and we will not disturb their finding upon this question, which was submitted to and considered by them.

The answer avers a tender of \$31.40, and admits an indebtedness to plaintiffs of that amount, yet the jury return a verdict for only \$20.40, and the court rendered judgment therefor. No question is made as to the sufficiency of the tender, and we think, under the verdict, plaintiffs ought not to recover their costs.

Although the evidence may have convinced the jury that plaintiffs' just demand did not exceed the sum named in their verdict, yet defendant was and is bound by the admission in his answer. Plaintiffs were, in any event, entitled, under the pleadings, to recover \$31.40, and the court should have rendered judgment for that amount.

The judgment will be reversed and cause remanded, with directions to the district court to render judgment for the sum above named.

The costs of the appeal will be equally divided between the parties; the balance of costs will be taxed against appellants.

Reversed.

SIEBER ET AL. V. FRINK ET AL.

1. It is not error to permit an answer to be filed after the statutory period for answering has expired — no default having been entered. *Quære*, whether the code renders it necessary in such case to obtain leave of the court to file answer.
2. In purely equitable cases, the trial must be to the court, unless both parties consent to a trial by a jury. Neither the chapter on references, nor any other provision of the code, operates to deprive the

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- court of the right, in such cases, to direct, upon its own motion, the taking and reporting of the evidence by a referee. The trial may be upon proofs thus taken, or upon testimony given in open court.
3. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed. It is not essential that this be done in term time.
 4. Where a cause is tried to the court upon proofs taken by a referee or master, it is the duty of the supreme court to sift and weigh all the evidence, with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses, and the judgment will be reversed if not supported by the weight of evidence.
 5. If the construction of a ditch be prosecuted with reasonable diligence, the right to water therethrough relates back to the commencement thereof.
 6. A failure to use water is competent evidence of an abandonment of the right thereto; and if continued for an unreasonable period, it creates a presumption of an intention to abandon; but this presumption is not conclusive and may be overcome by other satisfactory proofs.
 7. A change of the point of diversion on the same stream does not affect the priority acquired by the original appropriation, provided the quantity of water diverted remains the same, and no intervening appropriator is injured.
 8. To acquire a right to water from the date of diversion one must, within a reasonable time, employ the same in the business for which it was taken.

Appeal from District Court of Custer County.

THE facts are stated in the opinion.

MESSRS. BLACKBURN and DALE, for appellants.

MR. A. J. RISING, for appellees.

HELM, J. There was no error in allowing the answer to be filed. No default had been entered after the statutory period for answering expired, and it is doubtful if leave of court even was necessary, unless § 75 of the code may be construed as requiring such leave [§ 78, Code of 1883]; for it is said that the office of a default is "to

limit the time during which the defendant may file his answer," and that "if plaintiff fail to take a default before trial it is a favor to the defendant." *Drake v. Davenick*, 45 Cal. 463; *Manville v. Parks*, ante, p. 128.

Certainly when, as in this case, application is made, and leave granted, upon terms, by order of court, no default having been entered, there is no irregularity upon which we would reverse the judgment.

This is purely a chancery case; equitable questions only are presented and equitable relief alone demanded. The cause must be tried by the court unless both parties consent to a trial by jury; the court, of course, possessing the right to submit certain issues of fact, had they existed, to a jury or referee. § 14, p. 222, Sess. Laws 1879 [§ 154, Code of 1883].

The court in this action submitted no issue to the referee, and the referee assumed no judicial function; he determined no question and reported no finding; he only performed the ministerial duty of reducing the testimony to writing, and returning the same to the chancellor, who then heard the arguments of counsel and tried the case upon pleadings and the evidence so reported. We think that such cases may be tried upon proofs taken in this way, or upon oral testimony given in open court. We do not understand the chapter on references, or any other provision of the code, as operating to deprive the court, under the statute above cited, of the power, in cases like this, to direct upon its own motion the taking and reporting of evidence in the manner adopted herein; a power which was so fully conceded and so freely exercised before that instrument became a law. The case of *Williams v. Benton*, 24 Cal. 424, is not analogous; the reference there was to hear the evidence and decide the issue; the opinion considers the compulsory power of the court to authorize a *finding and judgment* by the referee. Besides, when that opinion was written, the California practice acts contained no such provision as

§ 14 above mentioned, a statute which had an important bearing upon this and several other questions connected with the distinction between procedure at law and in equity.

Counsel for plaintiffs in error express a desire to have this court review the case upon its merits, and "determine the rights of the parties so that the proper decree may be made below." And under the fourteenth and fifteenth assignments of error the argument and answer discusses but one proposition, viz.: the validity of a judgment *entered* in vacation. The question, therefore, which we shall consider under these assignments is whether a judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation.

In *Stearns v. Aguirre*, 7 Cal. 443, cited, the clerk attempted to enter a judgment in vacation, when it was neither rendered by a court, nor pronounced by law. Such a judgment is of course void; it is an attempt by a mere ministerial officer to perform judicial duties. The case is not in point upon the question above stated. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed. In jury trials our code directs the clerk to discharge this duty within a specified time after verdict, but if he fails or neglects to do so within the statutory period, the judgment itself, being pronounced on the verdict, is none the less valid, and may still be recorded; the code does not require the entry to be made in term time. And in no event does the provision limiting the time apply to trials by the court. The practice of entering judgments in vacation prevailed at common law. Freeman on Judgments (3d ed.), § 38 *et seq.* See, also, § 144 of our Code of Procedure.

The remaining assignments of error question the suffi-

ciency of the evidence to support the decree. Upon the principles of law governing the rights of the parties, counsel for both sides are in perfect harmony, a circumstance which is especially gratifying, as the court has no fault to find with the legal doctrines thus agreed upon. The case was tried in the district court mainly upon proofs taken and reported by a master or referee; it is, therefore, our duty to "sift and weigh all the evidence with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses." *Miller et al. v. Taylor et al.* 6 Col. 45.

The record contains over seven hundred and fifty folios of evidence, and we cannot analyze the same in this opinion; we shall content ourselves with a statement of the material conclusions of fact to be drawn therefrom.

Plaintiffs aver priority of right to the water in controversy through what is known as the "Wilson & Brown ditch;" defendants base their claim thereto upon alleged appropriations thereof by means of the "Old or Becker" and the "Edward P. Smith ditches." A fourth, called the "School Section ditch," is described in the testimony, and will command our attention. The Wilson & Brown ditch was constructed for the purpose of irrigating two tracts of land owned by Wilson and Brown, respectively. Plaintiff Wheeler is the grantee of Wilson, and plaintiffs Sieber and Hudson hold title under a conveyance from Brown.

The priority of appropriation through the Becker ditch proper is practically conceded, though a suggestion of abandonment is made; it is probably the oldest connecting with Antelope creek. We do not understand that plaintiffs complain of this appropriation of water; their contention is that defendants cannot use this priority to sustain their right to water through the School Section ditch.

We think plaintiffs are right in this respect. The head

of the former is on Antelope creek; that of the latter is on Cottonwood, a tributary of Antelope; both being above the confluence of the two streams. The latter was constructed in 1875, yet water was diverted from Antelope creek through the former as late as 1878; from the evidence and maps, we conclude that the former extends in a westerly, and the latter in a northerly, direction; they meet and unite, and the water from both may be used in irrigating the same tract of land. But there are two separate and distinct diversions and appropriations of water, dating at different periods, and the rights acquired attach upon the respective dates of appropriation.

There is some conflict of testimony as to the time of appropriation through the Wilson & Brown ditch; we are satisfied that the ditch was commenced as early as April or May, 1871, and that it was completed and water turned in by or before the 1st of August. The appropriation would, therefore, date from April or May of that year. We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: "Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." *Ophir M. Co. v. Carpenter*, 4 Nev. 544; *Kelly v. Natoma W. Co.* 6 Nev. 109.

Water was not appropriated through the Smith ditch until July or August of 1871.

If, therefore, there has been no abandonment of the right acquired by means of the Wilson & Brown ditch, the prior right of plaintiffs over the appropriations through the School Section and Smith ditches is established.

Upon the question of abandonment the testimony is by no means clear. From 1871 to 1875, according to the proofs, each of the three ditches constructed in 1870 and

1871 was neglected, and probably used but little during one or more of the seasons; but we cannot say that the evidence sufficiently establishes an intention to abandon either of them, or the right to water acquired thereby.

A failure to use for a time is competent evidence on the question of abandonment; and if such non-user be continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs.

The removal in 1876 of the head of plaintiffs' ditch and change of the point of diversion some eighty feet does not affect their right of priority. Both points of appropriation were upon the same stream; no change was made in the quantity of water diverted, and no one was injured by the removal; the use and the points of application to such use remained the same.

But it appears from the evidence of Wilson himself that prior to 1876 no part of the water appropriated through the Wilson & Brown ditch was used upon any portion of the Wilson tract. Of the quantity applied to the irrigation of the Brown ranch we are not satisfactorily advised. There is some proof that water "ran to waste" at the end of the ditch; and it may be that in 1871 and during the succeeding four years, but a part of the water diverted was actually applied to a beneficial use upon the Brown land. If this be the fact, plaintiffs are only entitled to priority for the quantity so used.

One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from the date of the diversion thereof, one must within a reasonable time employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case.

Plaintiffs Sieber and Hudson are entitled to a decree of

priority, and an injunction protecting the same, for so much of the water appropriated through the Wilson & Brown ditch as was used previous to 1876 in irrigating portions of the Brown ranch, of which they are the purchasers. But to determine this quantity farther proofs must be taken.

It appears that in the summer of 1876 the appropriation of water from the Cottonwood by the School Section ditch was enlarged. Such increase is subject to the right of plaintiff Wheeler, as well as Sieber and Hudson, acquired in the early spring of that year by the reconstruction of their ditch and diversion therethrough. But we have no definite means of determining this quantity from the record; further testimony upon this point is also essential.

The decree will be reversed, and the cause remanded, with instructions to the district court to take the necessary proofs upon the two questions above mentioned, and enter a decree in accordance with the views herein expressed.

The costs of the entire litigation will be equally divided between the plaintiffs and defendants.

Reversed.

ALEXANDER, COUNTY CLERK, ET AL. V. THE PEOPLE EX REL. SCHOOLFIELD.

1. The legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, the court will look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited.
2. When the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist.
3. The removal of county seats is a subject over which the law-making power has plenary jurisdiction and control. In the absence of constitutional restrictions, a removal could be authorized upon any vote, great or small, which that body deemed advisable.

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4. When the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale, and, having fixed in the statute the vote which shall be required, it becomes the paramount law, and nothing is left for implication.

Error to District Court of Custer County.

THIS was a petition for an alternative writ of *mandamus*, filed in the district court of Custer county February 19, 1883, and the writ was issued in accordance with the prayer of the petition, commanding "that immediately after the receipt of this writ, or a copy thereof, you, the said Max E. Alexander, do open and keep open your said office as and of county clerk aforesaid, at said Rosita, in Custer county and state of Colorado, for the transaction of all business pertaining to your office as county clerk and recorder of deeds of said Custer county, and you, the said Gerhard H. F. Meyer and W. W. Cantril, both and each, annul and disregard in the future all the acts and doings whereunder you claim and pretend to have right to meet, as county commissioners of said Custer county, at said Silver Cliff, in Custer county, Colorado, and to desist and refrain from sitting or pretending to sit, and from claiming right to sit, at said Silver Cliff, in the capacity of county commissioners of said Custer county, and to hold such (if any) sittings, and to claim right thereto, only at said Rosita, and not at said Silver Cliff, or that you, and each of you, show cause before the Honorable Charles D. Hayt, judge of said court, at the district court room, in Rosita, Custer county, Colorado, on the 2d day of March, A. D. 1883, at the hour of 10 o'clock A. M. on that day, why you have not done so.

"Witness Joseph W. Milsom, clerk of the district court of Custer county, Colorado, and the seal of said [SEAL.] court, at Rosita, in said Custer county, this 19th day of February, A. D. 1883.

"J. W. MILSOM,

"Clerk Custer County District Court."

To the answer of the respondents a demurrer was filed, stating, among other grounds, that:

2d. Said answer and return does not show that two-thirds of the legal votes cast at the said election were in favor of the removal of said county seat.

3d. It expressly appears that two-thirds of the legal votes cast were not in favor of the removal of said county seat.

Upon argument the district court entered judgment awarding a peremptory writ of *mandamus*, and thereupon the respondents prosecuted this writ of error.

Mr. JOHN R. SMITH, Mr. A. J. RISING and Mr. H. TOWNSEND, for plaintiffs in error.

Messrs. BLACKBURN and DALE, for defendants in error.

BECK, C. J. By an act of the legislature entitled "An act to regulate elections for the removal of county seats," approved February 11, 1881, it was, among other things, enacted, "*that not less than two-thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state.*"

The record before us presents the question whether the provision above cited is in conflict with § 2 of art. XIV of the constitution of this state, which is as follows: "§ 2. The general assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law, and no county seat shall be removed unless a majority of the qualified electors of the county, voting on the proposition at a general election, vote therefor, and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months, and in the election precinct ninety days next preceding such election."

In their interpretation of the above section of the con-

stitution counsel for plaintiffs in error lay much stress upon the clause, "*The general assembly shall have no power to remove the county seat of any county.*" They argue that the legislature is thereby prohibited from making any enactment respecting the vote requisite for a removal, different from that named in said § 2, the same being unalterably fixed therein.

They say the negative form of expression employed in the clause, "*no county seat shall be removed unless a majority of the qualified electors of the county voting on the proposition at a general election vote therefor,*" carries with it, by necessary implication, the affirmative proposition, that, if a majority do vote therefor, the county seat shall be removed. Hence they affirm with great confidence, that a bare majority is the *ultimatum* of the constitution as to the vote which shall authorize a removal, and that the legislature has no power to say that the vote shall be either greater or less, its power being restricted to the single duty of providing the necessary machinery for the removal.

On the part of defendants in error, it is contended that the vote mentioned in § 2 was only intended as a limitation upon the power of the legislature to authorize the removal by a smaller vote. In support of this view counsel cite the familiar doctrine that state constitutions are not grants of power to legislative assemblies, but limitations only; that plenary power in the legislature for all purposes of civil government is the rule, and that prohibition to exercise a particular power is an exception.

They insist that the ordinary meaning of the clause in issue is, that the general assembly shall not enact that less than a majority vote may remove, but may require a greater vote. Also, that there is no provision in the constitution, express or implied, which prohibits the passage of a law requiring a greater vote to authorize a removal.

The questions involved in the case have been ably and

thoroughly discussed. Counsel on both sides say they are all of easy solution, yet they manifest a confidence little short of absolute certainty, that the propositions which they announce in support of their respective theories are impregnable, and that the reasons assigned and authorities cited to sustain the same are conclusive.

Perhaps the great confidence entertained in these opposing views may be accounted for in part upon the theory suggested by Judge Cooley in his *Constitutional Limitations*, p. 49, that the different points of view from which different individuals regard constitutions incline them to different views of the instruments themselves.

The whole controversy depends upon the solution of the single question, whether that portion of the law of 1881 which requires a two-thirds vote to remove a county seat is in conflict with the constitutional provision that no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor.

The nature of the investigation upon which we are about to enter renders the following citation from the pen of Chief Justice Shaw peculiarly appropriate: "The delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation, passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt." *Wellington et al. Petitioners, etc.* 16 Pick. 95.

The following is also appropriate, respecting the duty of courts in such investigations: "Being required to declare what the law is in the cases which come before

them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it." Cooley's Const. Lim. (5th ed.) 193.

There would be greater force in the arguments employed to demonstrate the invalidity of the law of 1881, if the state constitution, like the national constitution, was a grant of enumerated powers. In such case we would look into the constitution to see if the grant was broad enough to authorize the legislature to declare what vote should be necessary to remove a county seat. But the legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, we look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited.

Another rule is, that when the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist.

The removal of county seats is a subject over which the law-making power has plenary jurisdiction and control. In the absence of constitutional restriction, a removal could be authorized upon any vote, great or small, which that body deemed advisable, or without any vote at all.

Looking into § 2, art. XIV, of the constitution, we note four principal limitations upon the power of the legislature over this subject:

First. The power to remove a county seat without a vote of the people is taken away. *Second.* The minimum vote necessary to effect a removal is prescribed. *Third.* A minimum limit is fixed as to the number of years that must elapse between successive submissions of the question. *Fourth.* The power of the legislature is limited as to the qualifications of the voters.

The section requires the passage of a general law on the subject, the evident purpose of the requirement being, that such law shall provide the regulations and prescribe the qualifications and requirements necessary and proper for the exercise of the right under consideration. And but for constitutional limitations, this law might provide for submitting the question of removal every year; it might qualify as an elector any resident of the county, without reference to the time of his residence therein or the precinct in which he resides; or it might enact that a plurality, instead of a majority vote, should effect a removal. Such a law would clearly be in conflict with constitutional restrictions.

It would seem, on principle, however, that above and beyond, or outside, the minimum limit, the jurisdiction would be unrestrained. This being so, the legislature would be as free to exercise its power and discretion in the *unlimited* jurisdiction as if no minimum limit on its powers had been imposed.

The application of this principle to the present controversy would show that the supposed conflict of the statute with the constitution does not exist, but that the legislature, in the passage of the act of 1881, acted within the scope of its jurisdiction.

This view being opposed to the theory upon which this writ of error is prosecuted, we pause here to note objections which have been interposed to the constitutionality of the statute referred to.

Counsel for plaintiff in error lay down the following propositions concerning the constitutional provisions involved:

“The power of the legislature is expressly prohibited from removing a county seat, and is expressly limited to providing the mode and manner and machinery for the removal.” * * * “The affirmative proposition implied in the negative expression, ‘No county seat shall be removed unless a majority of the qualified electors’ * * *

vote therefor,' is a constitutional right and power in the majority, and is a positive direction to that effect."

Under these assumptions as to the force and effect of the constitutional provisions, they inquire, "Will the courts entertain a construction that enables the legislature, under a pretext of regulating a removal, to prohibit the exercise of the right thus granted to the majority of the qualified electors of the county?"

The question is easily answered. If the premises were as stated, the courts would unhesitatingly answer, No. But we are compelled to say that the premises stated are not warranted by any language employed in the constitution. The authority cited in support of the conclusion drawn from the assumed premises is sound, but its application to the clauses of the constitution referred to is not perceived.

The leading authority cited relates to the constitutional right of suffrage, and is as follows:

"The legislature may regulate as to places, mode and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excised under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory." *Page v. Allen*, 58 Pa. St. 347.

These views were announced by Chief Justice Thompson in defining the rights of electors under the constitution of Pennsylvania. The learned jurist prefaces his observations by quoting *in hæc verba* § 1 of art. 3 of the constitution of that state. This section treats of the qualifications of electors. It divides them into three

classes, and enumerates in detail the qualifications of each class. As to an individual of the first class possessing the specified qualifications, the section declares he "*shall enjoy the rights of an elector.*" A person of either of the other classes having the prescribed qualifications, it declares "*shall be entitled to vote.*"

It will be observed that nothing remained for legislative action in this case but regulation purely. The qualifications were defined, fixed and enumerated in the constitution, and it was affirmatively declared those possessing them should be entitled to vote. It was correctly said of rights thus solemnly vested, they "*must not be impaired by legislation. It must be regulation purely, not destruction.*"

Now, in order to make a plausible application of the authority cited to the negative phrase of our own constitution, "and no county seat shall be removed unless a majority of the qualified electors of the county * * * vote therefor," it is assumed that this phraseology vests an absolute right of removal in the majority; that the language employed is self-executing and prohibitory, leaving nothing for legislative action save to provide the mode and manner of carrying the right into effect.

This is assuming the very thing in dispute. If the framers of the constitution intended to vest such absolute rights, free from legislative interference, this is surely a case wherein they have not "expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication," which the authorities say they are presumed to have done. Cooley's Const. Lim. 71.

If we were to adopt the interpretation contended for it would be equivalent to inserting limitations in the constitution which its framers did not put there, for they are neither clearly expressed, nor do they arise, as we think, by necessary implication.

The clause, "*The general assembly shall have no power to remove a county seat of any county,*" is referred to as strengthening the construction contended for. That clause has not the remotest relation to the question whether the legislature may fix the vote, or whether it has been unalterably fixed in the constitution. Its effect is to prohibit the legislature from removing a county seat without submitting the matter to a vote of the citizens interested. For the purpose cited it is consequently without significance.

The word "unless," which appears in the clause under consideration, is supposed to have great force in conferring upon the phrase an affirmative meaning. Upon this point we are referred to the views expressed by Judge Folger, in *Manning, Bowman & Co. v. Keenan et al.* 73 N. Y. 56.

He says: "The word unless has the force of *except*; its primary meaning is 'unloosened from,' so what follows in the sentence after the word unless is excepted or loosened from what went before it. * * * Such a form of expression in a statute sometimes amounts to an affirmative enactment, and in fact *in proprio vigore*, confers all that is excepted from a negative or restrictive provision. * * * Nor are instances lacking in enactments, where it is manifest that by the expression of matter under the lead of the word 'unless,' it was meant to affirm the contrary of what was previously stated."

Conceding the soundness of these views, we observe that they were announced in the interpretation of the phraseology of a *statute*, not of a *constitution*. The purpose and effect of the same negative sentence might be wholly different in the two instruments. For example, in the absence of constitutional provisions, the legislature would have unlimited jurisdiction of the subject of the removal of county seats. Were it to enact, in such case, that no county seat should be removed unless a majority of the qualified electors vote therefor, there

would be an affirmative implication that such a vote would authorize a removal. The practical effect of this negative phraseology would be equivalent to an affirmative enactment, for the reason that it would be the latest expression of the will of a body having jurisdiction of the subject.

The same provision, however, in a constitution would be a direction to the law-making power that it may not authorize, by law, the thing to be done upon a less vote than that of a majority. If the statute, when passed, should make no requirement at all on the subject of the vote, then, doubtless, effect could be given to the affirmative implication in the constitutional provision, and a majority vote be held sufficient.

When the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale, as we have before stated, and having fixed in the statute the vote which shall be required, it becomes the paramount law, and nothing is left for implication. This is but enforcing the rule announced by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton, *188, that the framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said.

It is no answer to this view of the subject to say, "If the legislature can say that a greater number than a majority shall be required to remove a county seat, they can say that every voter in the county shall vote for the removal, to effect the same, and thereby render nugatory the provision of the constitution as to a majority vote, and in effect prohibit the removal of a county seat."

An argument in favor of such a construction of the constitution as will nullify a statute is not aided by a suggestion that, unless the construction contended for be adopted by the courts, the legislature will have the power to pass laws prejudicial to the rights of the people.

It is not a legal inference that, if unrestrained, the

chosen representatives of the people may commit either a foolish or a corrupt act. Legal presumptions are in favor of the integrity and wisdom of legislators, as well as the validity of their enactments. Said Mr. Justice Washington, "It is but a decent respect due the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheaton, *270.

The remedy for bad or oppressive legislation, not obnoxious to constitutional restrictions, is said to be an appeal to the law-making power. If that should fail, the people in their sovereign capacity are supreme, and can correct the wrong. The courts can only enforce such limitations as the constitution imposes.

A certified copy of the proceedings of the constitutional convention, relating to § 2, art. XIV, has been furnished us by counsel, accompanied by the proposition that "the record shows clearly that the constitutional convention declared its purpose of leaving the removal of county seats to a vote of the majority of the qualified electors, and not to a two-thirds vote."

In our judgment these proceedings only show that a diversity of opinion existed in the convention as to how far the legislative power should be restricted on the subject of the vote that should remove a county seat. There is nothing in the proceedings of the convention to point out the purpose of the provision made by it concerning this vote, beyond that conveyed by the meaning of the words employed therein.

The plain, common sense import of the language used indicates an intention to restrict or limit the power of the legislature in respect to the general law which it was required to pass on the subject. That a portion of the members were in favor of placing the limitation at a majority, and a portion at two-thirds, does not indicate a

purpose of withdrawing the subject from legislative action and discretion, save only to the extent of the limitation imposed.

There are instances where the proceedings of the convention which framed a constitution are said to furnish valuable aid in its interpretation. We do not regard this as one of them. The inquiry here is purely one of interpretation of language. The constitution derives its force, says Judge Cooley, from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language used in the instrument according to the sense most obvious to the common understanding.

We hold, as to the objections raised against the act of February 11, 1881, that the act is valid. And it appearing from the record that two-thirds of the electors of Custer county voting on the proposition did not vote to remove the county seat of said county from Rosita to Silver Cliff, the county seat was not removed. The judgment of the district court is affirmed.

Affirmed.

SALSURY V. ELLISON.

1. The surviving partner of an insolvent firm may make an equitable and just assignment of the partnership effects for the equal benefit of all the firm creditors; but, in his position as trustee, he is not permitted to make an assignment and give preference therein to certain creditors.
2. Under the practice in this state an equitable defense may be made in a legal action; and, therefore, the defense that such an assignment is fraudulent and void as against an unpreferred creditor may be interposed in a legal forum.
3. Although such defense be not averred in the pleadings, yet if plaintiff establishes the same in making out his case, the objection that it is not pleaded in the answer will be considered as waived, and defendant may have the benefit thereof.

Error to District Court of Boulder County.

7	167
8	158
7	167
8	468
7	167
25	260

THE facts are stated in the opinion.

Messrs. HARMON and ELLIS, for plaintiff in error.

Mr. PLATT ROGERS and Mr. R. H. WHITELY, for defendant in error.

HELM, J. B. F. Pine, Jr., being the surviving partner in the firm of B. F. Pine & Son, executed a written assignment of all the firm property to defendant in error. This assignment was for the benefit of the firm creditors, but gave preference to two of them. The firm being insolvent, Brinker, one of the creditors not so preferred, brought suit and recovered a judgment for the amount of his claim. In aid of such suit, he caused plaintiff in error, as deputy sheriff, to levy a writ of attachment upon the property three days subsequent to the assignment thereof. Thereupon defendant in error, the said assignee, instituted his action of replevin for possession of the goods. This action was successful, and the present writ of error was sued out of this court to reverse the judgment rendered therein.

At the trial of the cause the written assignment aforesaid was admitted in evidence over defendant's objection. This action of the court is assigned for error, and the most important questions presented rest upon this objection: Can the surviving partner of an insolvent firm assign the partnership effects for the benefit of preferred partnership creditors; if he cannot do so, may the validity of such assignment be questioned in a legal action by a firm creditor, or must an equitable action be first instituted to cancel and set aside the same?

The surviving partner is a trustee, the firm property being the trust estate. The partnership creditors and the representatives of the deceased partner are the beneficiaries, there being also a beneficial interest in favor of the surviving partner himself; the sole purpose of the trust is the closing up of the partnership business, and

payment of the surplus, if any, after settlement of the debts, to the proper parties.

In the performance of his duties, the surviving partner is governed by the rules applying to ordinary trustees. His acts are scrutinized with the same care, and he is held to the same diligence and good faith as is required in the management of other trust estates. *Gillet et al. v. Gaffney et al.* 3 Col. 364.

His right to make an equitable and just assignment of the partnership effects and credits, for the equal benefit of all the creditors, is now recognized by a preponderance of authority. Such right is, we think, also recognized and regulated by § 68 of the General Statutes. When the assignment before us was executed, however, this act had not become a law. Therefore, our present investigation is not governed or in any manner affected thereby. But an assignment for the benefit of preferred creditors, *the firm being insolvent*, is declared invalid by courts of the highest dignity and worth. In his position of trustee for *all* the firm creditors, the surviving partner is not permitted to sacrifice the interest of one by favoritism shown to another. If there be not sufficient partnership property to pay all the debts, equity and good conscience require that the trustee shall distribute the proceeds therefrom ratably among the creditors.

There are authorities which seem to hold that a surviving partner may prefer creditors in settling the firm obligations; but so far as we have been able to discover, with a single exception, there was no question of insolvency in the cases upon which such declaration rests. The reason for the rule prohibiting preference among the creditors did not exist, and, therefore, such cases do not militate against the correctness of the rule where such reason appears. If the firm assets are sufficient to pay all of the firm debts, so that each creditor will ultimately receive compensation in full, preference in the

time or order of payment may not be inconsistent with the conditions of the trust.

The exception referred to is the case of *Egberts v. Wood*, 3 Paige's Chancery R. 526, in which the chancellor suggests that the representative of the deceased partner has "no interest in the question as to what debts shall be paid first, in case the partnership effects are insufficient to pay the whole," and, therefore, an assignment for the benefit of preferred creditors cannot be impeached on the ground that such representative had no knowledge thereof. The suit was brought by a firm creditor. The assignment was not sustained, but the reason given for declaring it void was that one of the *surviving partners* had no knowledge thereof, and gave no consent thereto.

But counsel for defendant in error insist that the acts of the surviving partner in this respect can only be questioned in a court of equity. That his assignment for the benefit of preferred creditors cannot be attacked in a legal forum.

From the nature of the transactions and legal *status* of the parties interested, it is true that these questions more often arise in equitable actions. But such an assignment, insolvency appearing otherwise, is held void as against a creditor injured thereby. No investigation is necessary to disclose this fact, for the instrument, the assignor being insolvent, bears on its face evidence of its own invalidity. Where the void assignment is offered and relied upon by the party to be benefited thereby, there would seem to be no good reason why objection thereto may not, under our practice, be made in a court of law.

In the action of ejectment, courts of law have long assumed the privilege of rejecting a void deed, and they have insisted upon a large concurrent jurisdiction with courts of equity in investigating certain questions of fraud for the purpose of determining such invalidity. A resort to equity is necessary to set aside or cancel such

an instrument, and remove the cloud upon title; but the defect appearing on its face, or being disclosed in a proper manner, courts of law simply treat the deed as a nullity, and ignore its existence. We do not think that such an assignment as the one before us ought to receive any greater consideration or protection than a void deed to realty. And this is especially true under our present system of procedure.

Had plaintiff averred ownership of the property replevied, by virtue of the assignment, defendant would have met the averment with an allegation of fraud upon creditors in the assignment, and the issue made upon the question would have been fully tried. There being only a general allegation of ownership in the complaint, it would be unjust to say that defendant might not object to the instrument upon which such ownership and right to possession entirely depend, where the matters appearing on the face of the instrument itself, together with the evidence already before the court, establish the fact that the claim of ownership is without foundation.

It must be borne in mind that the proofs of plaintiff in making out his case (including evidence without objection in cross-examination) show, beyond question, the *insolvency* of the partnership at the time of the assignment; also, the facts that the assignment was made for the benefit of the preferred creditors, and that Brinker was an unpreferred creditor to the extent of over \$3,000, and, therefore, plaintiff himself thus established a defense against his own action, which, if properly averred, would be decisive in a court of equity. It must also be remembered that, under our practice, an equitable defense is available in a legal action, and therefore defendant was entitled, upon proper averment, to prove the same as an affirmative defense in this case. He would not be permitted, after plaintiff makes out a *prima facie* case and rests, to offer evidence of a defense, either legal or equitable, which was not presented by the pleadings.

But when the evidence of plaintiff, in support of his case, discloses a perfect defense, whether the same be equitable or legal, he will be deemed to have waived the defect arising from a want of averment thereof in the answer, and defendant may have the benefit of such defense. This is especially true where, as in the case before us, defendant may not, previous to the trial, have information which would enable him to plead the defense in his answer.

Had the assignment been rejected by the court when offered in evidence, plaintiff could not have recovered; having been received, in connection with the other proofs, it established a defense and defeated his claim of right to possession of the property in controversy.

The judgment will be reversed and the cause remanded.

Reversed.

The following dissenting opinion was delivered by

BECK, C. J. The issues in this case were purely legal. The action was replevin, the complaint merely alleging ownership of the attached goods in the plaintiff Ellison. The answer denied such ownership — alleged ownership in B. F. Pine, the surviving partner of the late firm of B. F. Pine & Co., and an indebtedness of the firm to the attaching creditor. The fact that the plaintiff acquired his title through an assignment for the benefit of creditors, made by the surviving partner, was not mentioned in the pleadings.

Prior to the recent statute (which, however, does not affect this case) it was only in equity the rule obtained that the surviving partner of an insolvent firm could not assign the firm assets with preferences to certain of the creditors. Aside from this equitable rule the surviving partner could assign and convey the assets the same as his own property. Holding the legal title and possession, he could invest a purchaser or assignee with

good title. Of course, fraud may vitiate any contract, but the element of fraud in fact does not enter into this case. Neither does any matter of equitable defense, for the reason that no such defense was set up in the pleadings.

The assignment does not show on its face that the late firm of B. F. Pine & Co. was insolvent. This appeared by extrinsic evidence, elicited on the cross-examination of the surviving partner, who was a witness for the plaintiff.

While an equitable defense may be interposed in a legal action, I am of opinion that, to entitle a defendant to the benefit thereof, proper notice must be given that such a defense will be relied upon.

Where this is not done, I do not think that a party who has failed to sustain the legal issues involved in a cause is entitled to equitable relief based on the testimony only.

For the above reasons I dissent from the opinion of the court.

CARY V. MCINTYRE.

1. A condition of an accord agreement, like that of any other contract, may be waived by the parties thereto.
2. Where there is ample consideration for an agreement on both sides, and the party who does not sign it acts under it without objection, the agreement, when acted on, may become binding upon both parties, and the writing serve as evidence of the terms of the contract between them.

Appeal from District Court of Gunnison County.

THE facts are stated in the opinion.

Messrs. MILLS BROS., for appellant.

Mr. LEWIS BOISET, for appellee.

7	178
7	212
7	178
1a	114

HELM, J. On the 30th day of October, 1880, Cary, who was defendant below, and McIntyre, who was plaintiff below, entered into a written contract, by the terms of which McIntyre was to furnish and deliver to Cary at Gunnison two hundred thousand feet of good and merchantable lumber, of such kinds as Cary wanted, and two hundred thousand shingles. He was also given the privilege of delivering three hundred thousand feet of lumber in addition upon the same terms, if he should elect so to do; and was to "exercise all reasonable diligence in arriving at a speedy execution of the terms of the contract." He also engaged not to manufacture any boards, lumber or shingles for any other person until the contract was filled. In consideration of the foregoing, Cary promised to receive and pay for each and every load upon delivery thereof according to the terms of the contract, \$28 per thousand feet for the lumber, and \$4.90 per thousand for the shingles.

On the 18th of May following—nearly seven months after this contract was made—McIntyre had neither delivered nor offered to deliver any of the lumber or shingles mentioned therein; and Cary sent him the following letter:

"GUNNISON, COLO., May 18, 1881.

"W. F. MCINTYRE, Esq.—*Dear Sir:* You having failed to comply with the terms and conditions of the contract made and entered into between yourself and myself on the 13th day of October last, I hereby notify you that I shall from this day treat said contract as broken, and the terms and conditions therein sought to be made binding upon me will be considered as of no effect. If you wish to enter into a new contract on such terms and conditions as we may hereafter agree upon, I would be pleased to talk with you.

"Yours, WALTER CARY, JR."

A day or two after receiving this letter McIntyre encountered one Uppercu, who was acting as the agent of

Cary, or rather of the firm of Buck & Cary, for whom the latter purchased the lumber. The conversation which followed resulted in the indorsement upon the back of a copy of the original contract of the following, above the signatures of McIntyre and Uppercu, as appears therefrom:

“GUNNISON, GUNNISON COUNTY, COLORADO.

“In and for the consideration that Walter Cary, Jr., pay to me \$26 per thousand feet for one hundred and fifty thousand feet of lumber, the same to be delivered by me to him at the said town of Gunnison within the next sixty days, payment of said lumber so delivered to be on demand, I hereby revoke and cancel the within agreement and hold it null and void. Reserving the right to sell lumber to other parties.

“May 25, 1881.

W. F. MCINTYRE.”

“I hereby guaranty the payment of the above one hundred and fifty thousand feet of lumber at \$26 per thousand in manner aforesaid. E. A. BUCK,

“By J. W. UPPERCU, Att’y in Fact.

“GUNNISON, COLORADO, May 25, 1881.”

Uppercu carried this to Cary, who retained it and immediately expressed his satisfaction therewith, which fact Uppercu reported to McIntyre.

Thereupon McIntyre began delivering lumber, and up to the 25th of July Cary, by his agent, Uppercu, had received and paid for one hundred and eight thousand feet, both acting under the stipulation last above set forth. After the 25th of July he refused to receive or pay for any more lumber.

McIntyre brought suit upon the *original contract*, and recovered a judgment for \$492. From this judgment Cary prosecutes an appeal.

We shall not consider who first violated the October contract; neither will we determine whether the May writing was a substitute therefor, as appellant claims, or an accord thereof, as contended by appellee.

We may admit with counsel for appellee that Cary's letter gave McIntyre a right of action, and also that the May agreement was simply an accord; we may further admit that it was a kind of accord which did not, unless satisfied, bar a right of action upon the original contract.

In our judgment, the failure to render the accord a full satisfaction was the fault of McIntyre, and not of Cary. McIntyre was bound to deliver the one hundred and fifty thousand feet of lumber within sixty days from May 25th; this was an important and material feature of the accord agreement; the evidence, without conflict or contradiction, shows that, at the expiration of the time, there remained forty-two thousand feet undelivered. Cary was not responsible for this failure to comply with the agreement, and was in a position to decline further proceeding thereunder.

It is claimed that he was first in default by refusing to accept a few loads and parts of loads rejected in June. McIntyre's theory is, that since the May agreement did not expressly provide for good and merchantable lumber, or such lumber as Cary wanted, the latter was bound to accept anything tendered; he says, in testifying: "I told Mr. Cary, you will have to take just what I give you."

But we submit this is neither a fair nor a legal interpretation of the contract. If it is, McIntyre might have delivered old and unsound lumber, for there are no express words requiring it to be new or sound; he might have compelled Cary to take and pay for lumber which was worthless and unsalable at any price. This accord agreement must be construed in the light of the October contract, the business of Cary, and all other circumstances attending the making thereof. Giving it a reasonable construction, we think the lumber was to be of good quality. Cary says he refused the loads or parts of loads because they were not "merchantable;" there is evidence to show that by the word "merchantable" he

did not refer to the quality, but to the kind, of lumber. He says that under the compromise agreement McIntyre was to deliver the kind he wanted; and Cary further says: "He (McIntyre) told me if I did not want certain kinds to say so, and they would be taken down to his yard." The only denial of this last statement by McIntyre is in the language already quoted; but, notwithstanding that expression, McIntyre retained the rejected lumber, and went on delivering under the contract; he seemed to have thought no more about it until the institution of this suit some time afterwards.

A condition of an accord agreement, like that of any other contract, may be waived by the parties thereto. Under the circumstances, if Cary was bound by the contract to receive the lumber rejected, there was a waiver of this obligation to the extent, at least, of preventing McIntyre from rescinding the agreement and declaring it a nullity; he could only recover, if at all, for the loss occasioned by Cary's refusal to accept the rejected lumber. *McIntyre v. Barnes*, 4 Col. 289.

We do not agree with counsel for appellee that these are all questions of fact, and that they were properly submitted to and passed upon by the jury.

The fact that the May writing was not signed by Cary does not interfere with the mutuality or binding effect upon both parties of the accord agreement. There was no understanding that it should be signed, or even reduced to writing, before it took effect; there was ample consideration for it on both sides; Cary obtained a reduction in the purchase price per thousand, while McIntyre secured a guarantor for the payment of the price agreed upon, and acquired the privilege, denied in the October contract, of selling to other parties. Cary retained the May proposition or agreement, and notified McIntyre, by agent, of his satisfaction therewith and acceptance thereof; he acted during the succeeding sixty days under the same, receiving the lumber as delivered and paying

the \$26 per thousand as stipulated in the agreement. The form of the instrument and the language used make it doubtful if there was any thought that Cary should sign it; it is more like a proposition, which, when acted upon, became binding upon both parties; the writing simply being evidence of the terms of the contract between them.

Under the evidence appellee was not in a position to maintain his action upon the October agreement. The judgment must be reversed and the cause remanded.

Reversed.

7 178
32 200

WEESE ET AL. V. BARKER ET AL.

1. When parties are made plaintiffs to an amended complaint the presumption obtains that all consented thereto, otherwise those not consenting would have been joined as defendants under the code. Sections 11, 18.
2. In ejectment one tenant in common may recover possession of the entire tract as against all persons but his co-tenants.
3. Where a location certificate appears to have been in compliance with the statute, a mistake by the recorder, the party complaining, not having been misled, cannot avail himself of the error. Where judgment is permitted to go by default every issuable fact in the complaint is admitted.
4. Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to a trespass, and cannot form the basis for the acquisition of title.

Appeal from District Court of Park County.

THE facts are sufficiently stated in the opinion.

Messrs. GEORGE, MAXWELL and PHELPS, for appellants.

Messrs. WADE, DUNN and DANFORTH, for appellees.

BECK, C. J. The principal errors assigned are that the district court erred in allowing the amended complaint

to be filed, and in making Benbow and Hussey parties to the action.

The action was originally instituted by Barker and Wade as plaintiffs, alleging that they were entitled to one undivided one-half, or each to one undivided one-fourth, of the Tanner Boy lode, and that the defendants had wrongfully entered upon said claim and taken possession thereof, to the exclusion of the plaintiffs and their grantors, etc.

Afterwards leave was granted the plaintiffs, after service of notice upon defendants, to file an amended complaint in said cause, making the said Benbow and Hussey parties plaintiffs.

The amended complaint alleges, among other things, "that plaintiffs are, and were at the institution of this suit, owners and entitled to the possession of said claim in the following proportions, to wit: each to an undivided one-fourth, and that they claim the right to occupy and possess said premises by right of pre-emption and by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States and of said state of Colorado, and by actual prior possession as a lode mining claim.

Plaintiffs in error assume that Benbow and Hussey were made parties to the amended complaint without their consent. We have searched the record in vain for evidence to sustain this assumption. The averments of the amended complaint are to the effect that Benbow and Hussey are tenants in common with the original plaintiffs, Barker and Wade, and that each of said four plaintiffs is the owner of an undivided one-fourth of the property sued for.

All were proper parties to the complaint, and the presumption obtains that all consented to become parties plaintiffs, as otherwise those not consenting would have been joined as defendants. Civil Code, §§ 11-13.

The amended complaint having been filed by leave of

the court, after notice to the defendants, and the defendants having suffered a default to be entered against them, are in no position to complain of the judgment.

On behalf of the appellants it is insisted that the amendment changed the subject-matter of the action. This view cannot be sustained. True, the original complaint only claimed for the plaintiffs Barker and Wade an undivided half of the Tanner Boy lode; but as against the appellants they were entitled to recover the entire lode, and the original complaint might have been amended to claim the whole. The defendants did not claim to be co-tenants of Barker and Wade, but were claiming the entire lode by a wholly different and adverse title.

The law is that in ejectment one tenant in common may recover possession of the entire tract as against all persons but his co-tenants. *Mahoney v. Winkle*, 21 Cal. 583; *Hart v. Robertson*, id. 348.

The amended complaint alleges that the plaintiffs are the owners and entitled to the possession of the lode. It further alleges that each plaintiff is the owner of an undivided one-fourth of the lode. The stipulation of facts filed in the cause shows that all the plaintiffs derive title from the same source, that is, from the same act of location. It also shows that the defendants claim title by virtue of a location of the same lode, made subsequent to the plaintiffs' location.

Defendants were in no manner prejudiced by the filing of the amended complaint. The same title alleged in the original complaint was stated and relied upon for a recovery in the amended complaint. Defendants were not interested in this title, but claimed adversely to it. It was therefore wholly immaterial to them whether the action was brought in the names of the several co-owners against them, or in the names of a portion thereof.

But the point is made that plaintiffs' location was invalid, because the name of the lode was, by mistake, re-

corded "*Farmer Boy*," instead of "*Tanner Boy*," as it was written in the location certificate.

This was a mistake of the recorder, and cannot avail the defendants in this case. The certificate itself appears to have complied with the statute. General Laws, §§ 1813, 1814. Plaintiffs were not responsible for the mistake of the recorder. *Myers v. Spooner*, 55 Cal. 258. Besides, the defendants were not misled by the alleged error. They have permitted judgment to go against them by default. Their default admits every issuable fact stated in the plaintiffs' complaint. *Harlan v. Smith et al.* 6 Cal. 173; *Hutchings v. Ebeler*, 46 Cal. 557.

Among other issuable facts stated in the complaint is the following: "That heretofore, to wit, on or about the 11th day of February, 1880, while plaintiffs and their grantors were in peaceable, open, notorious and exclusive possession of said claim, working the same as aforesaid, defendants wrongfully and unlawfully entered upon said claim and took possession thereof, ousting plaintiffs and their grantors, and have ever since wrongfully held possession of said premises, to the exclusion of plaintiffs and their grantors."

The stipulation filed in the cause concedes that the lode was properly staked by the plaintiffs; that the mistake in the record was made by the recorder, and that the defendants staked and relocated said lode as abandoned property after the location by the plaintiffs.

Upon the merits, then, the appellants have no standing in this case. The record shows actual possession in the appellees, which is *prima facie* evidence of title, and as we said in *Lebanon M. Co. v. Con. Rep. Co.* 6 Col. 380, "entering upon premises in the actual possession of another, for the purpose of performing the acts necessary to constitute location and possession, amounts only to a trespass, and cannot form the basis for the acquisition of title."

Whether the location of Barker and his co-tenants be

valid or not, their possession is sufficient to defeat a recovery by the appellants.

We are further of opinion that the description of the lode set out in the amended complaint, as it appears in the record proper (Transcript, folios 18 to 23), is sufficient to identify the claim sued for. The boundaries of the claim are given, and in addition the following: "The discovery tunnel is about one-half mile below the old town of Timberline, on the line of Buckskin creek, on the south side of said creek, and two hundred feet north-west from the discovery tunnel on the Ioda lode." The judgment is affirmed.

Affirmed.

DE LAPPE V. SULLIVAN.

7	182
7	184
8	201
7	182
13	396
13	405
7	182
19	632

1. A judgment will not be reversed for errors which could not have prejudiced the appellant.
2. Where, by contract, one is employed by another to do work by the day or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. Such services are comprehended within the meaning of the statute, and after demand for the amount due the laborer may maintain attachment.

Appeal from County Court of Lake County.

THE facts are sufficiently stated in the opinion.

MESSRS. TEMPLER and HODGES, for appellant

MR. T. C. EARLY, for appellee.

HELM, J. No objection is made here to the amount of the judgment rendered by the county court, nor to appellant's liability therefor; it is conceded that the labor was performed and that appellee was justly entitled to the sum found due him.

Defendant below demanded an itemized statement of the account sued on; in response thereto plaintiff furnished the following: "Dec. 5th, 1882. Balance due for work to John Sullivan, \$182.65."

The court overruled defendant's motion filed under the statute for a more specific bill of particulars or statement. The first assignment of error rests upon this ruling.

The suit was tried in the county court on appeal from a justice of the peace, and therefore there are no written pleadings; but, nevertheless, we think the statute applicable to the proceedings in the appellate court, and that defendant might properly invoke its aid by the motion filed.

It is sufficient, however, for us to say that appellant is in no position to avail himself of an error, had one been committed in denying his motion. For, as already stated, he is not complaining of injustice or injury in the amount of the judgment rendered; he is seeking no reversal on the ground that the sum recovered is excessive, or that he was in any way surprised or prejudiced by the evidence offered in proving the plaintiff's account.

A judgment will not be reversed for errors which could not have prejudiced the appellant.

The ground averred in plaintiff's affidavit for attachment is "that the debt was for work and labor performed, which should have been paid at the time the work and labor was performed." This averment was duly traversed and put in issue by affidavit in the usual form. But by stipulation of the parties the trial of this issue was postponed till the final hearing; and it was then submitted to and determined by the court in connection with the principal case.

The proofs show that plaintiff was working for defendant by the day; that there was no stipulated time for payment of his wages, but that they were paid from time to time as plaintiff needed the money and made demand

therefor; that either party might terminate the contract of employment, as defendant did, at any time; and that, when discharged, plaintiff demanded the wages then due and unpaid.

Where, by contract, one is employed by another to work by the day or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. We think such services are comprehended within the meaning of the statute relied on, and that, after demand for the amount due, the laborer may maintain his attachment proceeding.

The court was justified in sustaining the attachment sued out in this case. This conclusion disposes of the remaining assignment of error. The judgment will be affirmed.

Affirmed.

7 184
Case 1
d18a 108

DE LAPPE V. SULLIVAN.

Appeal from County Court of Lake County

Per Curiam: The questions submitted for adjudication in this cause are identical with those considered in the case of *De Lappe v. John Sullivan*, which has just been decided. The evidence in no way changes or modifies the conclusions there arrived at. This appeal will therefore be determined in the same way.

The judgment of the county court will be affirmed.

Affirmed.

DUSING V. NELSON.

1. If a judgment entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered.

7 184
12 354
7b 184
17 96
7b 184
2a 85
7b 184
21 142
7b 184
8a 157
7b 184
2b 372
7 184
Case 2
29 230

2. Where, on error to a county court, the record shows that testimony was produced on the trial in support of the complaint, but has not been preserved, and the finding and judgment having been for the plaintiff, the presumption obtains that the allegations of fact on part of the plaintiff were duly proven.
3. The preponderance of American decisions tends to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may be advantageous to the estate, and such advantage is the main thing to be considered.
4. When it becomes necessary to save the estate from loss, it is right, and even obligatory, for the executor or administrator to purchase or take possession of land at the foreclosure of a mortgage belonging to the estate, and to hold the title for the benefit of the estate.

Error to County Court of Jefferson County.

THE facts are stated in the opinion.

MESSRS. BROWNE and PUTNAM, for plaintiff in error.

MR. A. H. DE FRANCE, for defendant in error.

BECK, C. J. This was an action of ejectment, brought by Nelson, the defendant in error, against Dusing, plaintiff in error, to the March term, 1880, of the court below, to recover possession of a quarter section of land. The last entry of record in said cause at the March term is in the following words:

“And now, after the demurrer being overruled to defendant’s additional answer, comes the said plaintiff and files his replication to said answer, whereupon the said defendant asks for judgment on said replication and the papers in this cause. And now, the court being fully advised in the premises, finds that there is not sufficient matter alleged in said replication on which to found an action. Therefore it is considered, ordered and adjudged by the court, that the said defendant have and recover of and from the said plaintiff his costs and disbursements by him in this behalf laid out and expended, taxed at

seven and five one-hundredths dollars, and that he have execution therefor."

No further steps were taken in said cause until the December term, 1880, of said court, when the plaintiff moved the court to vacate the judgment for costs entered at the March term, and for a rehearing of the defendant's motion for judgment upon the pleadings.

This motion was resisted by the defendant's counsel, but the court sustained the motion, vacated the judgment for costs, and granted a rehearing of the application for judgment upon the pleadings, to which ruling of the court the defendant duly excepted. Afterwards, on the hearing, the motion for judgment on the pleadings was overruled, and the cause set down for trial before the court, without a jury, by consent of parties. The finding and judgment were for the plaintiff.

The first error assigned questions the power of the court to vacate the judgment entered at the March term.

Two terms of court had intervened after the entry of the so-called judgment before the coming of the December term, at which subsequent proceedings were had. If, therefore, the order entered at the March term was, in fact, a final judgment in the cause, the court had no power to set it aside and to rehear and redetermine the issues after a lapse of two terms of court. Freeman on Judgments, §§ 90-96.

The court below appears to have taken the view that the action taken at the March term did not constitute a final judgment, and was not a final disposition of the case. We are of opinion this view is correct. Pothier says: "A judgment, to have the authority, or even the name, of *res judicata*, must be a definite judgment of condemnation or dismissal." Pothier, Ob. part 4, ch. 3, § 3.

If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocu-

tory and not final. To be final it must end the particular suit in which it is entered.

It is said that a judgment "that the defendant go hence, and that he recover his costs," etc., though not formal, is a good final judgment, because no further action can be taken while it remains in force, but that a judgment for costs alone is not final. Freeman on Judgments, §§ 12, 16. See, also, *Young v. Slonetraker et al.* 33 Mo. 117; *Adams v. Trigg*, 35 Mo. 190.

As we said in *Alvord v. McGaughey*, 5 Col. 244, "while a strict compliance with forms is not essential in the entry of judgments, yet, to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as the entry of a judgment." This intention must be fairly deducible from the language employed in the entry. Thus tested, a final judgment will show, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. The supposed judgment in this case, not conforming to the above requirements, must be held to be interlocutory merely.

Looking now at the case as presented upon the merits, we find but little conflict in the facts as presented in the pleadings. The amended answer on one side, and the replication on the other side, assume to set out the facts concerning the origin and theory of the plaintiff's title. And since the record shows that testimony was produced on the trial in support of the allegations of the complaint and replication (none of which has been preserved), and the finding and judgment having been for the plaintiff, the presumption obtains that the allegations of fact on the part of the plaintiff were duly proven.

Dusing, on the 9th of December, 1876, executed to one Oliver Graves, as trustee, a trust deed upon the land in controversy, to secure the payment of a promissory note for the sum of \$1,300, given by Dusing to one A. C.

Butler, payable in two years, with interest thereon at the rate of one and one-half per centum per month. After maturity of the note, default having been made in the payment thereof, the premises having been duly advertised for sale as required by the trust deed, they were, on the 24th day of November, 1879, offered at public sale by the trustee. There was then due upon the note about the sum of \$1,800. The highest bid offered by an outsider was \$625. Thereupon the trustee bid, for the executors of the estate of said Butler, who was then deceased, by virtue of a power of attorney held by him for that purpose, the sum of \$1,500, and that being the highest bid, the premises were struck off and sold to said executors for that sum.

A few days afterward, and before a deed was executed to the executors in pursuance of said sale, Nelson, the plaintiff, purchased the premises from the executors, through the said Graves, for the sum of \$1,800, and by direction of the executors this entire sum was entered on Dusing's note, and a deed executed by said trustee directly to Nelson. In the execution of this deed, then, consists the whole irregularity upon which the defense is based. That there is no equity in the defense is apparent from the fact that the defendant realized an additional credit upon his note of \$300, over and above the amount bid at the sale, by reason of the plaintiff's purchase, and of the transfer of the title to him.

If the trustee had executed a deed to the executors, in pursuance of the public sale to them, crediting their bid, \$1,500, upon defendant's note, and the executors had then executed a deed to Nelson, retaining, for the use of the Butler estate, the additional \$300 realized by the latter sale, there would exist nothing of the present defense except the point that "the executors could not purchase at the trustee's sale, even if present."

As an unlimited proposition of law, this is not correct. That its observance would have operated greatly to the

disadvantage of the defendant in the present case, and of the Butler estate as well, is manifest, when it is remembered that the highest bid at the sale, aside from the bid of the executors, was the sum of \$625.

By means of their purchase of the land the executors secured for their estate the payment in full of its demand against the defendant, and saved for the defendant the sum of \$1,175. The utmost good faith appears to have been exercised towards both debtor and creditor by the trustees referred to. Says Mr. Schouler, in his work upon Executors and Administrators, § 358: "The preponderance of American decisions tends rather to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may often be really advantageous to the estate, and that such advantage is, after all, the main thing to be considered."

And again, in § 323, he says: "When it becomes necessary to save the estate from loss, it is right, and even obligatory, for the executor or administrator to purchase or take possession of land at the foreclosure of a mortgage belonging to the estate, and hold the title for the benefit of the estate."

The equities set up in the defendant's answer constitute no defense to the action. The irregularities complained of all resulted to his advantage.

The trustees' deed vested the legal title in the plaintiff; therefore the equitable defense failing, and there being no application for affirmative relief, judgment was properly given for the plaintiff. Judgment affirmed.

Affirmed.

7	190
7a	249
7	190
23	108

THE PEOPLE EX REL. DEAN V. COMMISSIONERS OF GRAND
COUNTY.

1. The unsworn declarations of parties touching their qualifications as voters, after the election, and who were not present at the trial to contradict or explain such declarations, *held* to have been properly excluded as mere hearsay.
2. It is within the discretion of the court to refuse an attachment for a witness, who, after being subpoenaed, refuses to attend and testify; and the refusal of the court to issue an attachment will not warrant this court in reversing the finding, in the absence from the record of what it was expected to prove by such witness.
3. The act of 1876, requiring a two-thirds vote in favor of the removal of county seats, has no application to the county of Grand.

THE facts are stated in the opinion.

MESSRS. FRANCE and ROGERS, for the people.

MR. R. S. MORRISON, for the respondents.

STONE, J. This is an original proceeding brought to this court by *mandamus*, for the purpose of testing the validity of the acts of the board of county commissioners of Grand county in declaring the county seat of that county removed from Hot Sulphur Springs to Grand Lake, as the result of an election held for that purpose in the fall of 1880, and in removing the public records, offices and business to Grand Lake, as the lawful county seat.

In the opinion rendered by this court, when the case was formerly before us (6 Col. Rep. 202), we directed the issues of facts to be tried in the court below, and that the verdict of the jury, or the finding of the court therein, be returned to this court, showing, first, what number of votes was cast by the qualified voters of Grand county at the general election held in that county on the 2d day of November, 1880, on the question of the removal of the county seat of said county, and second, of the number of votes so cast, what number of legal votes was for Hot

Sulphur Springs, and what number for Grand Lake, for county seat. In accordance with said order, the record before us presents the proceedings and evidence in the trial of said issue, and the court returns its finding as follows, to wit:

“And now on this 18th day of August, A. D. 1882, this cause heretofore, at the present term of the court, having been submitted to the court upon the evidence and arguments of counsel in said case, and the court being fully advised in the premises, and a jury having been waived by the parties hereto, the court now finds that the number of votes casts by the qualified voters of Grand county at the general election held in said county on the 2d day of November, A. D. 1880, on the question of the removal of the county seat of Grand county, was one hundred and sixty-four, and of the number of votes so cast, the number of legal votes cast for Hot Sulphur Springs for county seat was seventy-one (71), and the number of legal votes cast for Grand Lake for county seat was ninety-three (93).

By the court,

[SEAL.] ·

“CHESTER C. CARPENTER, Judge.”

Counsel for the relator, in his argument filed herein, claims that this finding is erroneous, for the reasons that, first, admitting that the election returns show *prima facie* that Grand Lake received one hundred and one votes, Grand Lake, west side, thirteen votes, and Hot Sulphur Springs eighty-three votes, yet rejecting the thirteen votes cast for Grand Lake, west side, as having been cast for a separate point of location, and then also rejecting the twenty votes cast at Teller precinct, and twenty-seven votes cast at Lulu precinct, amounting to forty-seven votes cast for Grand Lake, as illegal, on the ground of non-compliance with the registry law, and it would leave but fifty-four votes for Grand Lake as against eighty-three for Hot Sulphur Springs; second, that the testimony shows that several votes cast at Grand Lake precinct for that place were illegal, and that more than

twenty others might have been shown to be illegal had not the court refused as evidence certain admissions made to the relator, Dean, after the election, touching the qualifications of voters who are claimed to have made such admissions; and third, that the court erroneously refused to order process to compel the attendance of certain witnesses on behalf of the relator at the trial.

In respect to the registration in the two precincts named, we find from the testimony of the judges of election that there was no registration of voters in Teller precinct, the reason being that the county clerk, whose duty it was to furnish registration blanks for the purpose, failed to furnish any to this precinct, and the board of election judges waited for them up to the day of election without receiving them or making any otherwise.

As to Lulu precinct, the record shows that a registration was made, which seems to be in substantial compliance with the statute, and a certified copy of the registration list was put in evidence without objection, and the returns from that precinct were therefore entitled to be counted.

There was no error in the refusal of the testimony of the relator as to the alleged admissions of certain voters made after the election touching their qualifications. Such testimony was but the unsworn declarations of parties who were not present to contradict or explain such declarations, and sound rules of evidence, as well as reasons founded upon public policy, favor the exclusion of such evidence as hearsay and a means of accomplishing fraud rather than justice. *McCrary on Elections*, §§ 270, 271, and cases cited.

As to the complaint that process was refused to compel the attendance of witnesses, it appears that certain witnesses who had been subpoenaed, and who had come to the place of trial in obedience thereto, had afterwards refused to appear in court and testify unless their fees were first paid, and that upon affidavit of these facts and

motion for attachment, the court declined to award compulsory process to compel such witnesses to appear in court and testify in the case. While the court, in its discretion, was undoubtedly authorized to compel such witnesses to appear in court and testify, yet for this court to reverse the finding of the court below, and send the case back upon that ground, is a different matter, and one we would not be warranted in doing, since the affidavit of the relator for the attachment prayed fails to set forth what is expected to be proved by such witnesses, or to even aver that the testimony of any one of them was necessary, pertinent, or in any way material in the case.

Coming to the count of the votes cast upon the question in controversy, it appears that counsel for respondents, acting under what was understood to be the rule laid down in McCrary on Elections, §§ 62-174, that where the presumption that votes cast were legal is overcome by the fact that there was no registry, the burden of proof is upon the party claiming the benefit of the vote to prove that it was legal, and entitled to be registered and cast, made proof that nine votes cast at Teller precinct, where there was no registry, were legal, and were cast for Grand Lake for county seat. It is then claimed, on behalf of respondent, that the legal number of votes to be counted for Grand Lake stands thus: Gaskill precinct, eight votes; Lulu precinct, twenty-seven votes; Grand Lake precinct, fifty-four votes; Hot Sulphur Springs precinct, four votes; Teller precinct, nine votes; making a total of one hundred and two votes for Grand Lake. The total vote at Grand Lake precinct was sixty, fifty-four of which were cast for that point for the county seat, including the thirteen which were cast for the location at Grand Lake, *west side*. We do not think that these votes should be rejected for that reason, as claimed on behalf of the relator. The question voted upon was the removal of the county seat from Hot Sulphur Springs

to Grand Lake, and the designation by the local voters at Grand Lake of a particular point at the lake as the preferred site ought not to be taken into account. Each individual voter might possibly have been interested in preferring a different spot as the exact site for the county buildings on the shore of the lake. It was a matter for the board of county commissioners to determine the exact site at the lake, if a majority of the legal voters of the county should vote in favor of the removal from the springs to the lake.

At Hot Sulphur Springs precinct fifty-nine votes were cast upon the question of removal, five of which were in favor of the removal to Grand Lake, and of these five votes four were found to have been legal, leaving fifty-four in favor of the springs, which, added to twenty-five cast at Troublesome precinct, make seventy-nine in all cast against the removal in the whole county. Taking the one hundred and two votes, as before estimated, as the total for Grand Lake, and seventy-nine for the springs, it gives Grand Lake a majority of twenty-three votes. If we reject the nine votes counted from Teller precinct in the above estimate—that is to say, if the entire vote at Teller precinct is thrown out—leaving a total of ninety-three for Grand Lake, it still gives a majority of fourteen votes for Grand Lake.

It is claimed on behalf of the relator that the testimony shows that eight or ten of the votes cast at Grand Lake precinct in favor of that point were illegal, and that had the court permitted the introduction of the evidence of Dean as to the declarations of voters, before referred to, it would have been shown that as many as twenty-nine altogether of the Grand Lake votes were not entitled to be counted. On the other hand, it is claimed by counsel for respondents that the evidence fairly shows that twenty-three certainly, and possibly twenty-nine votes cast at Hot Sulphur Springs for that point were proved to be illegal, and the names of the per-

sons who cast said votes are set out in the brief, together with the names of the witnesses by whose testimony each of such votes is claimed to have been proved illegal. It is difficult to determine, from the mass of testimony brought up by the record, and the uncertain and conflicting character of much of it, exactly how many votes on either side can be said to have been proved illegal or not entitled to be counted; but viewed in every possible way fairly, we think the number on both sides are so nearly equal that the result of the *prima facie* count is not affected. The exact data, or manner of estimating the number of legal votes by which the court below reached the finding returned here, is not stated in the return of said finding; but however the result may be, estimated fairly, we are satisfied that this finding is as nearly correct as the evidence presented by the certified copies of the registry lists, poll books and tally sheets of the election, together with the testimony of the witnesses heard upon the trial contained in the record and bill of exceptions, warrants, and should not be disturbed.

The act of 1876, requiring a two-thirds vote in favor of the removal of county seats, in order to effect such removal, did not affect the case before us, inasmuch as the county of Grand is expressly excepted from the provisions of said act. The finding of the court below is therefore approved, and the judgment of this court is, that the peremptory writ of *mandamus* prayed in this action be denied.

Writ denied.

ATKINSON ET AL. V. TABOR ET AL.

1. Where, by the subject-matter of a cross-bill, a contest directly involving title to mines is instituted, the bill alleging that the deed thereto, executed and deposited in escrow by one party, was surreptitiously obtained by the other; that the conditions of sale had not been complied with, and by reason thereof no title had passed;

7	195
120a	40
7	195
137	220

praying affirmative relief, and that the deed be surrendered up to be canceled, and the decree denied the relief prayed for,— *held*, that the decree related to a freehold, and was reviewable on appeal.

2. Matters may occur subsequent to judgment which operate to waive the right to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in error.

Appeal from District Court of Lake County.

MOTION to dismiss appeal.

Messrs. ROCKWELL and ROWELL, for the motion.

Mr. CLINTON REED and CHARLES S. THOMAS, *contra*.

Per Curiam: The appellees move to dismiss the appeal, and assign two principal grounds for the motion; one being that the appellants, since taking the appeal, have availed themselves of a large portion of the money deposited as the purchase money of the mines involved in the litigation, and have thus waived their right to have the judgment appealed from reviewed on appeal. The other ground of the motion is that the judgment appealed from does not relate to a franchise or a freehold, and is not a judgment for money, for which reasons no appeal lies.

The latter ground is not sustained, but directly contradicted by the record. The subject-matter of the cross-bill relates to a freehold. It institutes a contest directly involving the title to several mines, alleging that the deed executed and deposited in *escrow* by the appellants was surreptitiously obtained by the appellees; that the conditions of the sale were not complied with, and that for these reasons the title did not pass.

The cross-bill prays for affirmative relief, and that the deed be ordered to be delivered up to be canceled, and that the appellants be decreed to be the owners of the real estate, free and clear of all claims of the plaintiffs.

The referee found against the appellants on the issues presented by the cross-bill, and that they were not entitled to the relief prayed for. Consequently the effect of the decree was to deny appellants' claim of title to the real estate, and to recognize their right to the purchase money deposited under the contract. Nevertheless the judgment still relates to a freehold, and is reviewable upon appeal.

Upon the other ground assigned in support of the motion, that since taking their appeal the appellants have availed themselves of the benefit of the judgment and the contract, by accepting and receiving a large portion of the purchase money so deposited, thereby waiving their right to have appellees' title decreed null and void as having been surreptitiously obtained, we observe that this point cannot properly be raised by motion.

Matters may occur subsequent to judgment which operate to waive the right of a party to have the judgment reviewed on appeal, or upon writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in error. Powell on Appellate Proceedings, 121, § 12a, and authorities cited.

We entertain no doubt of the general proposition, that it is inconsistent with the principles of justice, and the rules of law, to permit a party, who has voluntarily taken advantage of a judgment rendered at *nisi prius*, to afterwards prosecute proceedings to reverse it.

Neither have we any doubt of the jurisdiction of this court, when such conduct of a litigant before it is properly alleged, and the matter does not appear of record, to institute the necessary inquiry whether the matters alleged to constitute the waiver have in fact occurred. To sustain the appellants' objection, and hold that we are without power to institute such inquiry, is equivalent to saying that the supreme court of Colorado is

198 DENVER & R. G. R'y Co. v. OTIS ET AL. [Dec. T.,
without power to determine a question pertaining to its
own jurisdiction.

The motion to dismiss will be denied, without prejudice
to the right of the appellees to set up the same matter of
waiver by a plea in bar to the proceedings on appeal.

Motion denied.

7 198
19 436
19 447
7 198
226 480

THE DENVER & RIO GRANDE RAILWAY COMPANY v. OTIS
ET AL.

In condemnation proceedings under the statute, in the county courts,
such courts are without jurisdiction where the amount of the
award is in excess of \$2,000.

Error to County Court of Chaffee County.

THE case is stated in the opinion.

Mr. L. K. BASS and Mr. JOHN M. WALDRON, for plaintiff in error.

Messrs. MARKHAM, PATTERSON and THOMAS, for defendants in error.

STONE, J. This was a proceeding instituted by plaintiff in error, in the county court of Chaffee county, for the condemnation of certain lands of the defendants in error for right of way for the railway of the plaintiff company. Several defects in the proceedings are alleged by plaintiff, which, if properly before us, might probably be considered grounds of error sufficient to reverse the case, but since these matters were presented by a bill of exceptions, which, for not having been prayed and allowed in due time, was, on motion in this court, stricken from the record, the matters thus brought up are not now before us for review. There remains, therefore, for our consideration, but one important ground of error, and that is a jurisdictional one.

The commissioners appointed by the court to ascertain and report the value of the lands taken for the said right of way, returned into court, as such ascertainment and finding, that the value of the lands so taken was \$1,500; that the damage to the residue of the lands of defendants not taken was \$2,500, and that the benefits to the land not taken were nothing, and hence the amount of the award altogether was the sum of \$4,000. Upon this award a rule was entered by the court for the right of way upon payment of said sum awarded.

Counsel for defendants, conceiving the amount of this award to be the only question properly before this court, have devoted their argument and brief filed herein solely to the support of the jurisdiction of the court below in entering judgment upon the award, but we consider it unnecessary to discuss the question here, inasmuch as we have recently passed upon the precise question in the case of *The Denver, Western & Pacific R. R. Co. v. Church*, decided at the present term.

In that case we held that, the jurisdiction of county courts, as to amount, being limited to the sum of \$2,000, such courts were without jurisdiction to proceed further in such case, where the amount of the award was in excess of \$2,000.

The judgment is reversed and the cause remanded, with directions to the court below to dismiss the proceedings. However, for the reasons given in the opinion in the case of *The D., W. & P. R. R. Co. v. Church*, *supra*, the plaintiff in error will be adjudged to pay the costs.

Reversed.

7	300
17	250
7	300
1a	280

BEAN V. THE PEOPLE EX REL. UPPERCU ET AL.

A recorder is not compellable, by *mandamus*, to allow abstract makers to use his office and the county records for the purpose of abstracting the entire records of the land titles of the county for sale.

Error to District Court of Gunnison County.

THE facts are stated in the opinion.

Mr. GEO. SIMMONS and Mr. S. P. ROSE, for plaintiff in error.

Messrs. MILLS BROS. and Mr. LOUIS BOISET, for defendant in error.

HELM, J. The principal question presented by the record in this case is one of statutory construction purely. Section 667 of the General Statutes provides that the county clerk shall keep his office "open during the usual business hours, Sundays and legal holidays excepted, and [that] all books and papers required to be kept in his office shall be open for the examination of any person."

The cardinal rule of statutory construction is to discover and declare the intent of the law makers. Counsel for the defendants in error contend that the section above mentioned needs and will admit of no construction. That the words "any persons" used therein include each and every individual who may choose to demand an inspection of the county records. But we are not prepared to accept this conclusion; we feel confident that an examination of the statute is proper with the view of determining whether or not the legislature intended to grant the privilege here claimed.

Relators in this case assert the right, under the law, to examine and abstract the *entire records* of Gunnison county for the sole purpose of securing future private emolument from the sale of abstracts thus obtained; they do not seek information concerning a tract of land in

which they themselves, or parties whom they represent, have or expect to have an interest.

Their business is permanent; to carry it on successfully they must not only by themselves or agents occupy the clerk's office for weeks, perhaps months, in abstracting the instruments already recorded, but they must also be there daily thereafter abstracting the conveyances filed from day to day. Their interruption and annoyance of the clerk are not temporary; they are continuing and permanent.

It matters not that relators require no aid from him; for he is charged by statute with the *safe keeping* and *preservation* of the records, and is responsible for their truthfulness and freedom from mutilation. A single stroke of the pen, the erasure or addition of a single word, may change the character of a conveyance, or destroy the most valuable property right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hands of a stranger out of his sight. If he performs his whole duty he must watch, or employ an assistant to watch, each and every person who examines or abstracts a single title record.

Did the legislature contemplate a business such as that of relators, and intend to impose upon the clerk these duties and responsibilities in connection therewith? Did they intend to say to him, "You must give relators, gratis, a part of your time and attention on each and every week day during your term of office?" If one person or partnership may subject him to this inconvenience, labor and annoyance, others may do the same; the abstract business is lawful, and in populous counties usually quite a number of individuals or firms engage therein. The clerk's entire time might be monopolized in this way, and yet he is allowed no compensation therefor.

Our laws require the county commissioners to provide, at the expense of the county, an office for the recorder;

to light and heat the same, and to furnish tables, chairs and all necessary appliances for the convenience and use of the recorder and of persons transacting therein the business contemplated by statute. Did the legislature intend to furnish, at public expense, office and desk room, together with tables and chairs, for the *permanent* use and convenience of persons engaged in a purely private speculative enterprise?

It is urged that this business is a great public convenience and security, that parties interested may more readily and perhaps cheaply procure desired information and abstracts; and that in case of loss thereof by theft or fire, any portion of the records may be duplicated from the abstract office. It is answered that the clerk is required to furnish abstracts and information to those desiring the same, at a compensation fixed by legislative enactment; and that it is the duty of the commissioners to provide safes and vaults sufficient to protect the records from loss and injury by fire or burglary.

We think that the business of relators should be treated as any other legitimate private enterprise. There is no law to prevent the clerk aiding them if he chooses so to do, either gratis or for a stipulated compensation; provided he does not neglect his official duties. But the court should not, by *mandamus*, compel him to do this against his will.

We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the *entire records* for future profit in their private business, the privilege of using continuously the public property, and of monopolizing from day to day, for months and years, a portion of the time and attention of a public officer against his will and without recompense.

In support of the foregoing reasons and conclusions, see *Buck et al. v. Collins*, 51 Ga. 391; *Webber et al. v. Townley*, 43 Mich. 534.

Entertaining these views upon the merits of this case,

we need not inquire into the regularity of the proceedings before the district judge.

The judgment will be reversed and the cause remanded, with directions to dismiss the petition.

Reversed.

HUGHES v. CUMMINGS.

The judgment of a court of general jurisdiction cannot be attacked except in a direct proceeding.

Appeal from District Court of Clear Creek County.

Mr. C. C. POST and Mr. W. T. HUGHES, for appellant.

Mr. R. S. MORRISON, for appellee.

ON petition for rehearing the following opinion was delivered by

HELM, J. We have carefully examined the exhaustive argument of counsel upon this application; but neither the reasons assigned, nor the authorities cited, warrant us in changing our views.

An effort was made to impeach the correctness of the record of a court of general jurisdiction in a collateral proceeding. This court has held that unless the defect complained of appears on the face of the record itself, the judgment of such a court is exempt from attack, save in a direct proceeding. The adoption of any other rule would render all judgments insecure, and result in the most disastrous consequences.

The district court had no jurisdiction to try the issue made by the replication; therefore no error was committed in sustaining defendant's demurrer thereto.

Rehearing denied.

7	508
2a	605
7	203
12a	175

7	204
8	201
7	204
14a	532

CHAPMAN ET AL. V. POCOCK ET AL.

Where the parties to be affected adversely by the relief sought, on error to this court, are not before the court, this court will not review the rulings and judgment of the court below.

Error to District Court of Lake County.

THE facts are stated in the opinion.

Mr. R. D. THOMPSON and Mr. W. H. NASH, for plaintiffs in error.

Mr. H. C. DILLON and JOHN Q. CHARLES, for defendants in error.

STONE, J. The only question brought up for review relates to the taxing of costs in the case. The plaintiffs were one of eight different sets of attaching creditors, who brought separate suits against the defendants in the district court of Lake county. Upon petition of all the plaintiff creditors a receiver was appointed by the court to take and dispose of the goods of the defendant firm for the benefit of the creditors. The goods, when seized by the sheriff under the attachment writs, were in the hands of a third party, who intervened in the suits as prior claimant of the property. The suits were afterwards dismissed at the costs of the plaintiffs, according to stipulation, the receiver was discharged, and all the property and proceeds in the hands of the receiver ordered to be paid and delivered to the intervenor. A referee was appointed by the court to investigate the accounts and doings of the receiver and report his proper compensation, and upon a hearing had upon the report of the referee, and upon exceptions to the report of the receiver, the court approved the receiver's report and taxed up the costs as follows: the clerk's and sheriff's fees were taxed to each party plaintiff as the same were incurred by each severally, and the total amount of the fees, costs and ex-

penses of the receiver, as approved by the court, was divided into eight equal parts, and one-eighth of the whole taxed against each of the eight parties plaintiff.

At a succeeding term of the court, and before another judge of said court, defendants moved for final judgment against the plaintiffs for the costs as theretofore allowed and taxed, when a cross-motion was made by the plaintiffs in error herein to retax the costs so as to apportion the costs of the receiver in proportion to the respective amounts sued for by each party plaintiff, instead of taxing an equal portion to each.

The amounts of the several claims sued for varied from a few hundred to several thousand dollars, that of the plaintiffs in error being \$328.80, and the largest of the others being \$4,473.67; and it was claimed by plaintiffs in error to be inequitable that each should be taxed a like amount of the compensation and costs of the receiver.

In respect to the amount of compensation and costs allowed the receiver, which appears to have swallowed up the most of the property that came into his hands, and in respect to the proportion of costs taxed to plaintiffs in error, which greatly exceeded the amount of their entire claim against the defendants, the case certainly presents features of hardship rarely met with in litigation; but there is another feature of the case, a consideration of which precludes us from interfering to reverse the ruling and judgment of the court below complained of. Since the property attached passed out of the hands of the defendants, and was adjudged by the court to go to the intervenor, the plaintiffs dismissing their suit at their own costs, it is evident that a retaxation of the costs would not affect the defendants in the least. The only parties to be affected by such retaxation of costs are the other plaintiffs, the co-plaintiffs of plaintiffs in error, and those parties, not having been made parties to the action in this court, are not before us. In this view it is unnec-

essary for us to pass upon the question whether, if such co-plaintiffs had been made parties to the *scire facias* herein, this court would be warranted, upon the case presented by the record, in reversing the ruling of the court below, and directing a retaxation of the costs, as prayed by the plaintiffs in error. It is sufficient to say that the only parties to be affected adversely by the relief sought herein are not before us, and hence we cannot review the rulings and judgment of the court below, in the absence of proper and necessary parties to the action therefor.

Affirmed.

KISKADDEN V. ALLEN.

1. "On or before March 12, 1882, I promise to pay to the order of A. two hundred dollars, at the City National Bank, with interest at ten per cent. per annum, value received. This note becomes due and payable when (if before March 12, 1882) A., B. & Co. shall dispose of a part or all their interest in the New York Hotel, or when the interest of B. may be sold or disposed of," *held*, to be a promissory note and not affected by the contingency appended.
2. When a party indorses a note, at the time it is made, and before delivery to the payee, and with a clear understanding that the note would not be accepted unless so indorsed, the party so indorsing such note will be considered as a joint maker, and may not set up want of consideration moving to him.
3. This court will not review questions not properly raised by specific assignment of error.

Appeal from County Court of Arapahoe County.

THE case is stated in the opinion.

Mr. JAMES H. BROWN, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

STONE, J. The action in the court below was by appellee against appellant upon the following instrument, to wit:

7	206
13	430
7	206
1a	336
7	206
5a	128
7	206
13a	336
7	206
20a	247

"\$284.00. DENVER, COLORADO, January 12, 1882.

"On or before March 12, 1882, after date, I promise to pay to the order of J. O. Allen two hundred and eighty-four dollars, at the City National Bank, with interest ten per cent. per annum. Value received. This note becomes due and payable when (if before March 12, 1882) Allen, Burke & Co. shall dispose of a part or all their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of.

(Signed)

"M. C. BURKE."

And indorsed, "WILLIAM KISKADDEN."

Appellee got judgment for \$298.75, which judgment the appellant Kiskadden asks to have reversed on the grounds that:

First. The instrument sued on is not a promissory note.

Second. That there was no consideration for the signing by appellant.

Third. That appellant was discharged by merger of the contract in a prior judgment in favor of appellee against Burke.

Fourth. That appellant was merely a surety, and was discharged by the conduct of appellee.

Upon the first ground it is argued that the instrument is not payable at a time certain, and that it is not payable at all events.

We think these objections are opposed to a fair construction of the instrument. The body of the obligation is a definite promise to pay at a time certain; it is in the usual form of an ordinary promissory note. The words appended to the body of the note provide that if the interest of Allen, Burke & Co., or that of Burke alone, in a certain hotel, shall be sold before the date of maturity of the note, then the note shall become due and payable upon the happening of the event of such sale. This was a contingency which might or might not happen; but whether it happened or not, the note, by express terms,

became payable upon a certain day mentioned. This condition, therefore, if given the meaning it fairly imports, does not affect the character of the instrument as a promissory note.

As to the objection of want of consideration, this is not well taken, since the testimony shows, without contradiction, that the defendant indorsed the note at the time it was made, and before delivery to the payee, and with the clear understanding that the note would not be accepted unless so signed by the defendant; and this court has held, that when a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee; or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. *Good v. Martin*, 1 Col. 165; and same case, 2 Col. 218. Clearly, then, as joint maker the defendant was liable, even though he did not participate in the consideration for which the note was given, for in such case he is deemed to have adopted the consideration of his joint maker. This being the case, we need not pass upon the special consideration for which, as shown by the testimony, the defendant indorsed the note.

In respect to the third point, that the contract of the defendant was merged in the prior judgment of the plaintiff against Burke, a point which is made by counsel for defendant to rest upon the conceded liability of the defendant as joint obligor, we need only say that this point, even if there be anything in it, is not properly raised by specific assignment of error, and, in accordance with our settled practice, we will not undertake to review

points not clearly covered by the assignments upon the record.

The other point made by counsel, that the defendant was merely a surety on the note, and that the conduct of plaintiff operated to release such liability, is unavailing. In support of the third point above passed upon, the counsel for defendant admits that defendant was a joint maker of the note, and cites the case of *Good v. Martin, supra*, to the truth of this proposition. If, then, the defendant, as joint maker, was an original promisor, he could not at the same time be liable merely as surety. But if he had been liable only as surety, the conduct of plaintiff set up, to wit: that, subsequent to the maturity of the note, plaintiff paid a sum of money to Burke, equal in amount to that of this note, in settlement of a certain suit of Burke against plaintiff, was not of that character which would of itself operate to discharge the supposed suretyship liability of defendant upon the note in question. The judgment of the court below is affirmed.

Affirmed.

TUCKER, EXECUTRIX, v. EDWARDS.

1. The statute of frauds has changed the rule of evidence, not the rule of pleading. A plea which set forth a contract for the conveyance of real estate is good on demurrer, though it does not aver that the contract was in writing — it not appearing in the plea that it was *not* in writing.
2. Under the old practice, while the parts of each plea could not be repugnant to each other, still separate special pleas might be inconsistent, yet not render the pleadings obnoxious to demurrer.
3. The failure to make the accord a full satisfaction, being the fault of plaintiff, defendant was not, in this case, precluded from the benefit of this defense.
4. A defendant does not waive his objection to the ruling on demurrer to his plea of accord and satisfaction by going to trial on the plea of *nul tiel* record.

7	209
10	281
7	209
15	538
7	209
22	246
7	209
9a	25
7	209
25	287
7	209
29	155
7	209
d10a	152
19a	167

Error to County Court of Jefferson County.

THE case is stated in the opinion.

Messrs. WELLS, SMITH and MACON, for plaintiff in error.

Messrs. MARKHAM, H. C. DILLON and Mr. NORTHP, for defendant in error.

HELM, J. Upon a careful examination of the record before us, we conclude that there is but one error of sufficient importance to justify a reversal.

This is a proceeding by *scire facias*, under the old practice, to revive a judgment. After considerable preliminary skirmishing, defendant below filed four special pleas in bar of the action, viz.: First, *nul tiel* record; second, *actio non accrevit*, three years; third, *idem*, seven years; and fourth, accord and satisfaction. That plaintiff agreed with defendant, that if defendant would journey with him from Boulder to Gilpin county, and pay all the expenses of both during the journey, and, at plaintiff's election, either convey to him, by quitclaim deed, a certain property right which defendant then had in and to a certain parcel of the public domain, or, in lieu of such conveyance, pay him \$100 in cash, he would receive such conveyance or money, together with the other acts and expenditures specified, in full satisfaction of the judgment, to revive which this proceeding is now instituted, and also satisfaction of the costs connected therewith. That afterwards said journey was made at defendant's expense, in accordance with the terms of the contract, and that defendant "was, then and there, willing and ready, and ever since hath been, and now is ready and willing to convey to said plaintiff, by deed of quitclaim, the said property right, or to pay him \$100," as he, the said plaintiff, should elect.

To the first of said pleas a replication was filed; to the

second, third and fourth, a demurrer was interposed. This demurrer the court sustained, and the cause was then tried upon the issue of *nul tiel* record.

The fourth plea stated a good defense, and the demurrer thereto should have been overruled. We may suppose, with counsel for defendant in error, that the contract therein stated provided for the transfer of an interest in lands; yet it was not necessary to aver that the same was in writing. There is nothing in the plea to show that it was *not* written, and therefore no demurrer would lie upon this ground. The statute of frauds has changed the rule of evidence, not the rule of pleading. Gould's Pleading, ch. 4, § 43, and cases.

But counsel argue that the ruling of the court was proper, because the pleas were inconsistent. The pleadings in this case must be tested by the rules relating to the subject, as they existed with us prior to 1877. Section 14, p. 504, Revised Statutes of 1868, would seem to answer counsel's objection. It permits the defendant to plead "as many matters of fact, in several pleas, as he may deem necessary for his defense." A similiar statute was construed in Illinois to allow the filing of pleas which are inconsistent with each other. *Farnan v. Childs*, 66 Ill. 547. See, also, *People ex rel. Crawford v. Lathrop*, 3 Col. 448, interpreting a like code provision, and *Peters v. Ulmer*, 75 Pa. St. 403.

Under the procedure existing when this suit was brought and determined, the parts of each plea could not be repugnant to each other, but separate special pleas might be inconsistent, and yet not render the pleadings obnoxious to demurrer.

By the terms of the contract averred in the plea under consideration, plaintiff was given an option; he was to have the privilege of electing between the conveyance of the property interest, and \$100 in cash. He has never made this election, and the averment by defendant of his constant readiness to do either is sufficient. It cannot be

said that he must make an actual, technical tender of either the deed or the money, at least until plaintiff indicates his choice. See 1 Chitty's Pl. (16th ed.) *336.

The failure to make the accord a full satisfaction, being the fault of the plaintiff, defendant was not precluded from the benefit of this defense. See *Cary v. McIntyre*, decided at the present term.

Plaintiff in error did not waive his objection to the ruling upon this demurrer, as counsel contend. The plea of *nul tiel* record, and that of accord and satisfaction, present entirely dissimilar issues. The former denies the existence of the original judgment as pleaded; the latter admits its existence and avers satisfaction thereof.

Had defendant amended the latter plea and gone to trial thereon, this assignment of error would not now be considered; but trying the issue made by the former was no waiver of his objection to the court's ruling against the latter.

For error in sustaining the demurrer to defendant's fourth plea the judgment must be reversed.

Reversed.

BUCK V. WEBB ET AL.

1. *Bona fide* creditors should be accorded preference over a secret and hidden equity against the property of the debtor, of which they knew nothing at the time of giving credit; and provision to this end may be effectual in a decree entered in a suit to which such creditors are not parties by "saving their rights."
2. In an action by a creditor to enforce his right of precedence over the holder of such secret trust, all the parties in interest may be joined and the whole controversy settled in one suit.

Error to County Court of Gunnison County.

THE facts are stated in the opinion.

Mr. LEWIS BOISET, for plaintiff in error.

Messrs. SHACKELFORD and KARR, for defendants in error.

HELM, J. The complaint in this case avers that in 1880, Webb, one of the defendants in error, brought suit in the district court and obtained a decree recognizing and enforcing a secret, resulting trust upon certain lands and other property held by the Good Enough Milling & Mining Company, the other defendant in error; that said decree required the company to convey to Webb title to the property therein described; but that the decree, and also the deed afterwards executed in pursuance thereof, further provided that Webb should take the property subject to the payment therefrom "of any and all just debts against the said The Good Enough Milling & Mining Company, which may be determined by due process of law, to be preferred over the claim of said William H. Webb, in and to the said land and other property."

The complaint further alleges, that, before the rendering of said decree, the company became indebted to plaintiff's assignor, and still remains indebted to plaintiff in the sum of over \$1,100, for goods, wares and merchandise sold and delivered at its instance and request; that at the time of such sale and delivery neither plaintiff nor his grantor had any notice or knowledge whatsoever of the existence of defendant Webb's said secret trust; that the company was then in possession and the apparent owner of the property; and that when this suit was commenced the company was wholly insolvent and had no effects of any kind whatever.

Each of the defendants filed a demurrer to the complaint on the grounds: First, that the facts stated do not constitute a cause of action; second, that there is a defect or misjoinder of parties defendant; and third, that causes of action are improperly united. These demurrers were

sustained and judgment rendered for defendants. We are now asked to reverse this judgment.

The truthfulness of the foregoing averments in the complaint is, of course, admitted; and it is apparent that plaintiff must look to the property conveyed to Webb or lose his entire debt. Whether he may do so or not depends upon the construction we shall give to the reservation above mentioned in the decree and deed.

No protection of *bona fide* mortgage, judgment or other existing incumbrance or lien, was needed in the decree. No action taken or conclusion reached in that proceeding could interfere with the rights of such prior incumbrancers. If, therefore, we say that this provision of the decree refers to this class of obligations, we declare that the court did something which was entirely unnecessary; that it performed the useless task of protecting rights which needed no protection. To take this view is practically to admit, with counsel for defendant in error, that the condition in question is merely surplusage. But under a well known rule of construction, it is our duty to give meaning and effect to this provision if we can reasonably do so. The whole of the decree and deed must be considered, together with the purposes of the court in connection therewith; and both instruments must be so interpreted as "that every word, if it may, may take effect and none be rejected."

The object of the court in rendering the decree, as we understand it from the complaint, was to protect the interest of Webb arising out of his equitable rights in the property. But the company had for some time been transacting business, and had incurred debts, among which was that of plaintiff in error. The trust recognized and enforced by the court not only arose by implication of law, but was also secret. It was clearly the province of a court of equity to guard as far as possible the rights of the company's creditors who became such without notice of the secret claim or interest of Webb.

This, we believe, the district court endeavored to do; that portion of the decree under consideration was doubtless intended to protect the interests of just such creditors as plaintiff in error. The phraseology is not the best that might have been used, but its meaning is reasonably plain. The "preference" given to "all just debts" is such a superiority or advantage as a court should award a *bona fide* creditor over a secret and hidden equity, of which he knew nothing, against the property of his debtor.

But counsel for defendant in error argue that the rights of persons not parties or privies to a suit cannot be affected by a judgment or decree rendered therein.

It is true that the interests of such persons cannot be *injuriouly* affected thereby; but courts of equity have the power to protect, by reservation or limitation in their decrees, the rights of individuals who appear to be interested, even though they be not parties to the action. The usual and proper course is to continue the cause until such persons can be made parties and their rights adjudicated. Many instances exist where this must be done; but when, as in the case before the district court, the rights of plaintiff against the defendant may be fully determined without the presence as parties of such persons, the court may render a decree reserving and protecting therein their interests. This power is expressly recognized in the fortieth order of the English Chancery Orders of 1841, and in the fifty-third rule of the Equity Rules of 1842, supreme court of the United States. But section 16 of our Code of Civil Procedure renders unnecessary any further discussion of this subject. It provides that a "court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, *or by saving their rights.*"

This was all the district court undertook to do; it said to Mr. Webb: "You have an equitable right to this

property; that right shall be enforced, and protection shall be given you in connection therewith; but inasmuch as by your own conduct in keeping secret your interest, the company was given a fictitious credit, and enabled to incur obligations, you shall take the property incumbered. Innocent creditors of the company, without notice of your equity, shall have the right, upon the establishment of their claims, within a reasonable time, in the manner provided by law, to subject this property to the payment thereof."

The remaining questions presented by the record before us may be discussed together. These questions are, was there a misjoinder of parties defendant, and were causes of action improperly united in the suit?

Our consideration of the first ground of demurrer leads us to the following conclusion, viz.: That the provision in the decree and deed, concerning the just debts of the company, created a specific lien upon the land thereby conveyed to Webb, in favor of certain creditors. The recording of either the decree or deed gives notice of this lien to all the world.

The objects of this suit, therefore, are to show that plaintiff is one of these creditors, and entitled to the benefit of this lien; also to enforce the same. The preliminary propositions to be established are: That plaintiff has an existing valid claim against the defendant company; that such indebtedness was incurred prior to the date of the decree in favor of defendant Webb; and that when the credit was given, neither plaintiff nor his assignor had any knowledge of Webb's secret equity.

It is possible that plaintiff might first bring a separate suit against the company, and reduce his claim to judgment; then proceed in another action to enforce his lien. But supposing Webb should appear at the former trial, offer to show that his property might ultimately be subjected to the payment of this judgment, and ask to be made a party, should not the court grant his request?

He has a vital interest in the result; he is entitled to know that the claim is just, and that the judgment is not exorbitant. But with him as a party, why not try the remaining questions and enforce the lien in the same action?

Again, the situation is analogous to that of a debt secured by mortgage, where the land has been sold by the mortgagor. In the action of foreclosure, both the original mortgagor and the purchaser are proper parties. The former has an interest in the controversy, because he is liable for the balance should the property fail to pay the debt. The latter, though he bought with notice of the mortgage, is interested, because his property is to discharge the obligation secured thereby, and because he owns the equity of redemption. *Dunlap v. Wilson*, 32 Ill. 523. The insolvency of the mortgagor, if that be his condition, does not affect his right to contest against the judgment, or the liability which may thereby rest upon him.

The complaint was sufficient, there was no misjoinder of parties or of causes of action, and both the demurrers should have been overruled. The judgment will be reversed and the cause remanded.

Reversed.

RALPH ET AL. V. WEARY ET AL.

This court will not consider errors not excepted to below. It is the province of the jury to determine the weight of testimony when conflicting.

Error to County Court of Summit County.

Mr. F. M. HARDENBROOK, for plaintiffs in error.

Mr. J. A. HALL, for defendants in error.

HELM, J. No objection was taken or exception reserved by either party during the progress of the trial; we are, therefore, precluded from considering errors, if any were made, either in the admission or rejection of testimony, or in the giving or refusing of instructions.

But two witnesses were examined in the case, and there is no strong preponderance of proof upon the disputed points. The testimony of Weary, who was sworn on behalf of plaintiffs below, establishes their right to recover from defendants the amount of the judgment. Bergman, who testified for defendants below, contradicts Weary in some important particulars. But the cause was tried to a jury, whose province it was to pass upon the weight of testimony and credibility of witnesses; they resolved the doubts arising from these conflicts in the evidence in favor of plaintiffs, and a disturbance of their verdict by us would be unwarranted. The judgment of the county court must be affirmed.

Affirmed.

MOONEY V. THE PEOPLE.

7	218
8	447
7	218
15	278

1. While a court may, upon its own motion, or upon the application of a juror, exercise its discretion in the matters of excuse or exemption, and if a juror be excused for an insufficient cause, it is not ground of reversal, yet the rule cannot be extended to a challenge for cause and judgment thereon.
2. Every person charged with a felonious crime is entitled to a list of the jurors comprising the regular panel previous to his arraignment. The prisoner has the right to object to the depletion of the regular panel on insufficient grounds.

Error to District Court of Jefferson County.

THE case is stated in the opinion.

Mr. F. A. NAYLOR, for plaintiff in error.

Attorney-General D. F. URMY, for defendant in error.

BECK, C. J. Plaintiff in error was indicted for cattle stealing, jointly with Enos C. Good and George Good, by the grand jury of Jefferson county, at the November term, 1881, of the district court of said county.

Upon his own motion, plaintiff in error was awarded a separate trial, which resulted in a verdict of guilty, upon which he was sentenced to a term of penal servitude in the state penitentiary of nine years.

Eight errors are assigned as having occurred upon the trial, the first of which seems to be well taken.

It is as follows: "The court erred in sustaining the challenge to F. C. Kleinman, who was called as a juror in the trial of said cause."

The juror challenged appears to have been on the regular panel, and to have served as a juror in a previous trial, but whether upon the trial of either of the co-defendants of plaintiff in error does not appear from this record.

Upon his *voir dire* the juror answered that he had served upon "the other jury," and heard all the testimony, but had no opinion in this case; that he applied what he heard to the case on trial, and would have to hear some evidence before he could give an opinion in this case.

Upon these answers the district attorney challenged him for cause, and the challenge was sustained by the court, to which ruling the prisoner excepted.

In support of the ruling, it is argued that the record shows the juror had served upon the preceding trial of Enos C. Good, who was jointly indicted with plaintiff in error, and for this reason he could not have been free from bias, or have been a suitable juror.

We fail to find anything in the answers of Kleinman which show him to be disqualified to try the accused. As before stated, it does not appear from the record that the jury upon which he had previously served was impaneled in the trial of Enos C. Good, the co-defendant of plaintiff in error, nor is there anything in the record

before us to show whether said Good was convicted or acquitted.

It appears that the regular panel of jurors was exhausted before the jury was complete, and that four talesmen were summoned and sworn upon the jury. This brings the case within the rule announced in *Stratton v. The People*, 5 Col. 276. It was there held that while the court may, upon its own motion, or upon the application of a juror, exercise its discretion in the matters of excuse or exemption, and if a juror be excused for an insufficient cause, it is not ground of reversal, yet the rule cannot be extended to a challenge for cause and judgment thereon.

Every person charged with a felonious crime is entitled to a list of the jurors comprising the regular panel previous to his arraignment. The advantages to the prisoner of this right are pointed out in the case cited, and the conclusion arrived at, that the prisoner has the right to object to the depletion of the regular panel on insufficient grounds.

This is the only error we observe in the record, but it is so palpable that the judgment must be reversed and the cause remanded for a new trial.

Reversed.

7	220
15	218
16	468

THE CITY BANK OF LEADVILLE V. TUCKER.

1. Though no fees are fixed by the statute for the care of property held by a sheriff under attachment, yet the rule is now settled that the officer is entitled to reimbursement for such reasonable charges therefor as may be allowed as costs by the court or judge.
2. In such case the plaintiff who sues out the attachment and causes the levy is liable, if his suit be dismissed, to the sheriff for such sum as may be so allowed, and it is proper to tax these charges as part of the costs in the case.
3. In such case, if the amount taxed is excessive, the plaintiff, by motion to retax, has a remedy for the enforcement of his rights, as complete as if the sheriff were required to bring an action for such expenditures, the reasonableness of which he might contest by answer.

Error to County Court of Lake County.

Messrs. GEORGE, MAXWELL and PHELPS, for plaintiff in error.

Mr. D. J. HAYNES and Mr. D. E. PARKS, for defendant in error.

HELM, J. The personal property attached in this action consisted partly of engines, boilers, pumps, etc. This property, by direction of plaintiff's attorney, the sheriff held possession of, under the writ, at the mine where it was when attached, for the period of nine months. To do this, he was compelled to employ a keeper, whom he paid \$5 per day. The suit was finally dismissed with the consent of plaintiff, and at its costs. The clerk taxed, as costs, the expense of keeping the property at \$5 per day, and also that of removing it at the expiration of the time aforesaid, and storing until the termination of the suit. A motion to retax costs was overruled by the court.

There is nothing in the record requiring us to pass upon the reasonableness or justice of the sheriff's charges. He was ordered by the plaintiff not to store, but to hold possession at the mine. The mine may have been so situated, and the hardships and dangers so great, that \$5 per day was the least sum for which a reliable person could be procured to perform the duty. But the finding of the county court upon this matter is not presented for our consideration.

The questions before us for adjudication are: Is the sheriff entitled to any reimbursement at all for these expenses? If he is, can they be recovered of plaintiff below? And if these two questions are answered affirmatively, can they be taxed as costs in this suit by the clerk, or must the officer resort to a separate action therefor?

Upon the first two of these questions there can be no doubt. This is not the case of a promise of extra com-

pensation in the performance of a duty for which the fee is fixed by statute. The point presented is simply the sheriff's right to just and equitable expenses incurred in the proper care and keeping of attached property while in his custody. For obvious reasons, no fees are fixed and no rule is stated by statute for determining these expenses. Neither, on the other hand, is there anything in the statutes, which, in terms or by implication, requires him to make these expenditures *without compensation* therefor. The law does compel him to take and retain possession of the property, and it holds him responsible for the preservation and safe keeping thereof. There were formerly many doubts as to his right to reimbursement for expenses incurred in this way, but the question now seems thoroughly settled in his favor. The rule now is, that if plaintiff recover, and the property be ultimately sold by the officer under execution in the suit, he may deduct these charges, if allowed, out of the proceeds received. If the judgment goes for defendant, or, as in the suit at bar, the cause be dismissed, he may look to the plaintiff therefor. See the following works, and cases cited therein: Drake on Attachment, § 311; Story on Bailments, § 131; Crocker on Sheriffs, §§ 1144 and 824.

The officer's rights are, if possible, stronger when the plaintiff directs at what place and in what manner the property shall be held under the writ.

The remaining question before us is more difficult to answer. The authorities seem to be somewhat in conflict. But, upon principle, there appears to be no reason why these expenses may not properly be allowed and taxed as costs. Technically they are not fees; but they are disbursements necessarily required in the performance of a duty enjoined upon the officer by law. Costs are not confined to fees paid the officers; they are "expenses incurred by the parties in prosecuting or defending a suit at law." 1 Bouvier's Law Dict. 370.

Such charges as these are made in connection with the

suit, and the plaintiff or defendant, as the case may be, is liable therefor, just as he is for the regular fees. Our statutes allow the successful party to recover his costs, unless the court otherwise directs. Many of the cases hold that, from the date of the levy until the final determination of the attachment proceeding, the defendant is primarily liable to the officer for the reasonable expenses of keeping or storing. Supposing the defendant in this case had paid the sheriff the charges under consideration, would they not be such "expenses incurred in the suit" as would properly be taxable as costs against the plaintiff? Theoretically, the officer collects his fees and expenses at or before the performance of the duties in connection with which they become due. But practically, almost all sheriffs, if the parties litigant be responsible, wait until the termination of the case for a large part of their fees and disbursements. This forbearance does not in any way interfere with the officer's right to his pay.

We assent to the proposition that fees and costs cannot be collected unless allowed by statute. But, as above indicated, it is our opinion that the disbursements under consideration are costs, within the meaning of our laws. If we are correct in this, there is no more reason in remitting the officer to a separate suit for these charges than for regular fees not collected in advance. To require the institution of a separate suit in every case where the sheriff fails to collect fees in advance would be disastrous to litigants as well as himself. There is no necessity for such a rule. If these expenses are allowed as costs by the court, and taxed by the clerk, the party dissatisfied can, by a motion to retax, as fully and fairly inquire into and try the legality, justice and reasonableness of the same as he could in another action. Parties ought not to be harassed with a multiplicity of suits, and it is to the interest of all concerned that the additional trouble and expense of a new action be avoided.

But the *amount* of these expenses is not and cannot be

fixed by statute, and they are not properly taxable as costs until allowed by order of the court or judge, and we think the sheriff's account therefor should first be so examined and allowed. The clerk ought not to tax such charges as costs upon his own motion in the first instance.

We do not say that a separate suit therefor may not be maintained by the officer. Our conclusions are, that he may present his bill in the attachment proceeding to the court or judge, and procure an order allowing the same, or so much thereof as may be deemed proper; that the amount so allowed may be taxed and recovered as other costs of the suit; that although the court has passed upon the question, a party complaining may, by his motion to retax, procure a rehearing and re-examination, and have his objections fully adjudicated.

In this case it appears that a motion to retax was made, and the questions raised thereby were fully tried. We are of opinion, therefore, that the action of the clerk in taxing these costs without an order of the court or judge could not have so prejudiced plaintiff in error as to justify a reversal. The judgment will be affirmed.

Affirmed.

KING v. THE PEOPLE.

1. An indictment which charges that "K. * * * and one Martha E. did then and there unlawfully live together in an open state of fornication," is good.
2. Evidence, uncontradicted, that "K. told me, after the indictment was found, that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than other men who went to the row and slept with other women," is sufficient to justify the court and jury to conclude the "overt act" was committed.

Error to District Court of Clear Creek County.

THE case is stated in the opinion.

Messrs. POST and SMITH, for plaintiff in error.

Attorney-General D. F. URMY, for the people.

Per Curiam: The first assignment of error requires no argument from us; it is answered by the indictment itself. The offense is charged jointly; the language is, "that Theodore King * * * and one Martha Estes did then and there unlawfully live together in an open state of fornication." This is substantially the language of the statute. In *Delany v. The People*, 10 Mich. 241, cited and relied on by counsel, the information charged that Thomas Delany * * * "did lewdly and lasciviously associate and cohabit with Mary Stewart." The court held that Mary Stewart could not be convicted of the statutory offense upon this information, and hence Delany could not; that the offense was made joint by statute, and each must not only join in the act or acts, but that both must do so "lewdly and lasciviously," or neither could be convicted; and therefore the information must charge them jointly. This conclusion concerning the indictment or information is not contradicted. See Bishop on Stat. Crimes, sec. 708, and cases.

But, as already observed, the objection, even if available in a proper case, is without foundation in the one before us.

The assignment based upon error in the admission of testimony is not well taken. Counsel admit that "if there had been any evidence of any overt act of plaintiff in error in connection with Martha Estes," the evidence of which they complain was proper.

The witness Campbell testifies as follows: "King told me, after the indictment was found, that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than other men who went to the row and slept with other women." No testimony

was offered contradicting this witness or questioning the foregoing statement made by him.

We are not advised of counsel's views as to what proof would be sufficient to establish the "overt act," as they term it; but in our judgment, the court below and jury were not far astray in considering this undisputed evidence as ample to dispel any doubt upon the question. These are the only objections we deem it necessary to notice. The judgment will be affirmed.

Affirmed.

THE PEOPLE EX REL. ATTORNEY-GENERAL V. THE CITY
BANK OF LEADVILLE.

Where a banking corporation, under the statute, fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture.

In the Supreme Court.

INFORMATION in the nature of a *quo warranto*.

Attorney-General D. F. URMY and Mr. L. S. DIXON,
for the people.

Mr. L. P. MARSH, for respondent.

STONE, J. In his information herein, the relator, the attorney-general of the state, represents that the respondent, The City Bank of Leadville, was incorporated on the 9th day of June, 1882, and organized as a banking corporation under and in pursuance of the provisions relating thereto, contained in the act of the general assembly of Colorado, entitled "An act to provide for the formation of corporations," approved March 14, 1877, and thereby became a body corporate by the name aforesaid, with a capital stock of \$100,000, fifty per cent. of which was, upon such organization, paid into its treasury in cash, and a certificate to that effect, under the

oaths of the president and cashier thereof, filed in the proper offices of the state, and of the county of Lake, and that from that time, until the filing of this information, has continued to transact the business of such banking corporation; that by the terms of the statute aforesaid, the respondent corporation was forbidden to continue the transaction of its business beyond the period of one year from and after the date of its creation and organization, unless its entire capital stock was fully paid up in cash; that the residue of said capital stock, to wit, the sum of \$50,000, was not so fully paid up at the expiration of one year as aforesaid, to wit, on the 9th day of June, 1883, nor has the same since been so paid up, but that, on the contrary, the sum of \$36,000 of said capital stock had been issued prior to the said last mentioned date, and not paid for in cash, and that no payment thereof has since been made, as by law required. The said relator, therefore, avers that the charter and franchise of the said respondent bank have become forfeit, and that for the space of more than seven months last past said respondent has exercised, and still continues to exercise, the privileges and franchises of a banking corporation without warrant of law, and therefore has usurped, and still usurps, the same.

Wherefore, the relator prays the process of this court that the respondent answer to the people of the state why its said franchise and charter should not be adjudged forfeit, and the respondent ousted of the same.

The answer of the respondent, filed herein, denies that the said bank has, for and during the period alleged in the information, used or usurped the privileges and franchises of a banking corporation without warrant of law, for that, on the contrary, during said period, the acts and doings of said bank have been exercised for the sole purpose of closing up the affairs of said bank, and surrendering its charter.

After setting out a statement of the affairs and financial

condition of the bank, together with some of the causes leading to the suspension of its business as a bank, the answer avers that, on the 16th of January last past, for the purpose of lessening the expenses of winding up and settling the affairs of the bank, and being duly authorized thereto, the said bank, by its duly authorized officers, executed and delivered to D. H. Dougan a deed of assignment of all its property and assets in trust, conditioned that the said Dougan should proceed at once to reduce the said assets and property to money, and apply the same to the payment of the debts of the bank; that the said Dougan duly accepted such assignment and trust, and took possession of the said property and assets, and holds the same for the purpose of said trust, and that "thereupon, then and there, said bank closed its doors, and thence hitherto the same have remained closed."

The answer concludes by praying for such judgment and decree of this court as will protect the interests of said bank and the stockholders thereof, and the interests of such as are prosecuting any suits now pending, or hereafter to be brought against said respondent bank.

The answer, in effect, confesses the substantial charge alleged against it in the information, to wit, that its charter and franchise have become liable, and subject to be declared forfeit and surrendered to the state. Upon the pleadings, therefore, it only remains for this court to pronounce a judgment in accordance with the prayer of the relator, and properly conditioned with respect to the rights of parties in interest, as prayed by respondent, and as provided by law. The statute concerning the dissolution of corporations, General Laws, §§ 307, 308 and 309, makes ample provisions, in cases of such dissolution, for the mode and manner of settling up the affairs of the dissolved corporation, in view of the rights of parties in interest, and for the protection of such rights.

Neither the relator nor the respondent has asked for any specific judgment or decree, aside from that touch-

ing the forfeiture of the charter and franchise of the corporation. The judgment of the court, therefore, is that the charter and franchise of the said respondent, The City Bank of Leadville, heretofore doing business as a banking corporation, at the city of Leadville in the county of Lake and state of Colorado, be adjudged and held forfeit, and that the said corporation be denied and prohibited the further possession, use and exercise of any and all the rights, powers and privileges of the charter and franchises aforesaid, and that the said corporation be dissolved; and inasmuch as it appears from the answer of respondent herein that the property, assets and affairs of the said corporation are already in the possession and control of a trustee, duly appointed and authorized to settle up the business concerns of the said corporation, and for that no other or different person has been prayed to be, by the court, appointed as trustee or officer for such purpose, the said trustee already appointed, as aforesaid, is at liberty to proceed in the proper discharge of his duties in the premises, in the settlement of the business and winding up the affairs of said respondent corporation, in accordance with law and the statutes in such case applicable; and provided further, that the prosecution or defense of actions heretofore brought by or against the said bank, and pending at the time of the filing of this information, shall in no way be affected by this judgment or decree, but such cases may be prosecuted or defended in the name of the said banking corporation, by the said trustee or assignee appointed and authorized as aforesaid.

7	230
11	518
7	230
14	405
7	230
12a	285

THE PEOPLE EX REL. KELLOGG V. FLEMING ET AL.

1. The doctrine of this court is that section 21, article 5, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force.
2. The repealing clause of a statute is to be understood as designed to repeal all conflicting provisions in order that the new statute can have effect. And when the statute itself is held to be invalid, nothing can conflict with it and therefore nothing is repealed.

INFORMATION in the nature of a *quo warranto*. The facts are stated in the opinion.

Mr. N. F. CLEARY, of counsel for relator.

Mr. S. J. HANNA, *amicus curiæ*.

BECK, C. J. An information in the nature of a *quo warranto* was filed in this court in the name of the people, upon the relation of William Kellogg, district attorney of the fifth judicial district of this state, charging that the respondents are unlawfully holding certain city offices in the city of Leadville, that is to say: The said John D. Fleming is unlawfully holding the office of mayor; the said W. W. Officer is unlawfully holding the office of city clerk; the said H. T. Sale is unlawfully holding the office of city attorney, and the said Edward Cuddihee is unlawfully holding the office of city marshal.

Upon the filing of the information a rule was entered requiring the respondents to appear upon a certain day and show by what warrant or authority they and each of them hold their respective offices. Thereupon a citation issued, which was personally served upon the said Officer, Sale and Cuddihee, but said Fleming was not found. In respect to those served with the citation, their default to appear and answer the rule herein entered

against them must be construed as an admission that the matters of fact charged in the information are true.

The substance of the information is, that said city officers are severally claiming to hold their respective offices for the term of two years from the 16th day of April, A. D. 1883, by virtue of an election held in said city, in pursuance of an act of the legislature, entitled: "An act to amend sec. 78 of chapter 'C' of the General Laws of the state of Colorado, entitled 'Towns and cities, and especially cities of the second class,'" approved February 11, 1883, and that said act is believed to be unconstitutional.

The first objection to the act of February 11, 1883, is that the subject of the act is not sufficiently expressed in its title. Sec. 21, article V, of the constitution, is as follows:

"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title, but if any subject shall be embraced in any act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

All the information to be derived from an inspection of the title of this act is, that it was proposed to amend a certain section of chapter "C" of the General Laws. There is a chapter of the General Laws which is numbered "C," but it is not entitled "Towns and cities, and especially cities of the second class," nor is there any chapter in the volume so entitled.

Chapter "C" comprises three separate legislative acts, each bearing its appropriate legislative title, and the several sections of all said acts, bearing their original numbers in addition to the general number in the compilation.

The title given by the compiler to the whole chapter is "Towns and Cities."

The only act in this chapter which contains seventy-

eight sections is entitled "An act in relation to municipal corporations." Sec. 78 of this latter act is under the subdivision "Cities of the Second Class."

It is apparent that the title of the act in question is very defective in matters of description. But a more serious defect is that the subject of the proposed legislation was not only not clearly expressed in the title, but was not expressed at all.

The history and purpose of the constitutional requirement referred to is readily ascertained by consulting the numerous adjudications by courts of last resort upon similar constitutional provisions.

According to Judge Cooley, the provision was designed to prevent the joining in the same bill subjects diverse in their natures and having no necessary connection; also to prevent the insertion of clauses in a bill of which the title gives no intimation. *People v. Mahany*, 13 Mich. 481.

Judge Gardiner, of New York, says the purpose was that neither the members of the legislature nor the public should be misled by the title. *The Sun Mutual Insurance Co. v. The Mayor*, 8 N. Y. 241.

Judge Cole, of Wisconsin, says the design and purpose of the provision was obviously to prevent the mischief of uniting together, in the same bill, various objects which had no necessary connection with each other, and in order to guard the legislature and community affected by the law against surprise and imposition. *Durkee v. The City of Janesville et al.* 26 Wis. 697.

In view of these citations, it is plain that the design of the constitutional provision, that no bill except general appropriation bills should be passed containing more than one subject, which should be clearly expressed in its title, was wholly disregarded by the legislature in the present instance. The only information in respect to the subject and extent of the legislation proposed, obtainable from the title of the act of February 11, 1883, was that it was proposed to amend said section 78. It is but

rational to conclude from this notification that the proposed amendment would be germane to the subject-matter of the section to be amended. That section relates wholly to the duties and powers of mayors of cities of the second class. It is as follows:

"SECTION 78. The mayor of cities of the second class shall be the presiding officer of the city council, and shall vote when there is a tie, but not otherwise."

In point of fact the subject-matter of the section is not amended at all, but re-enacted in substantially the same words. The amendments made were amendments to other portions of the act entitled "An act in relation to municipal corporations," approved April 4, 1877, which act contains one hundred and four sections, one of which is said section 78. Other sections of said act make the mayor's term of office one year, and provide that the city clerk, city attorney and city marshal shall be appointed by the city council. This act attempts to change the mayor's term of office from one to two years, and makes the offices of city clerk, city attorney and city marshal elective instead of appointive. It also assumes to legislate concerning the powers, duties, compensation and term of office of all the foregoing officers. As to each and all of said matters section 78 is silent, save only as to certain powers of the mayor, and those are not changed by the amendment.

All the foregoing matters are mentioned and provisions made concerning them in other sections of the former act; a circumstance which makes the title of the latter act still more misleading than it would otherwise be, for it gave no intimation of an intention to alter these other sections, which were really the only sections affected by the amendments.

To one familiar with the contents of chapter C, or who should, upon hearing or reading the title of the bill to amend section 78, open the General Laws and read said section together with the rest of the chapter, the title of

the proposed bill could not possibly convey the slightest intimation of the character of its amendments. Indeed, the more intimate one's acquaintance with said chapter C, the more he would be misled by said title as to the character of the amendments proposed to be made to section 78.

The doctrine of this court is, that section 21, article V, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force. *C. & G. Road Company v. The People*, 5 Col. 40.

Now, what is the subject expressed in the title of this bill, and what is germane to this subject?

The subject expressed is, "An act to amend section 78 of chapter C."

Germane to this subject are those matters which relate to the subject-matter of the section. Matters relating wholly to other portions of chapter C, and not mentioned in section 78, are foreign to the subject expressed, and quite as liable to mislead as if no such matters were mentioned in the chapter.

Section 78 makes the mayor the presiding officer of the city council, and authorizes him to vote in case of a tie, but not otherwise. Under a pretense to amend this subject it was re-enacted, but not amended, and most radical changes made in other portions of the chapter, and affecting subjects wholly foreign to those mentioned in that section. Since, then, the essential condition to the validity of legislative enactments required by the constitution has been ignored *in toto* by the legislature in the passage of the act of February 11, 1883, no part thereof being germane to the subject expressed in the title, it becomes our duty to declare said act to be void.

Counsel for the relator also insists that it is absurd, repugnant and void upon another ground, viz.: That in

respect to all of said city officers it provides that they shall be elected on the first Tuesday of April in each and every year, and that each shall hold his office for the term of two years, and until his successor is elected and qualified.

This would appear to be a proper case for the application of Lord Coke's doctrine (which received such sharp criticism from the English jurists), "that where an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law shall control it and adjudge it to be void." Potter's *Dwarris on Statutes*, page 76.

Certain it is that in this instance the rule that, in construing a statute, "full sense and meaning must be given to every clause and provision," cannot be complied with.

Mr. *Dwarris* cites as an instance of difficult construction, "where the design of the framers of a law cannot be seen." Surely this must be a specimen of the class of legislation referred to.

I venture the suggestion that a law which requires the mayor of a city to be elected on the first Tuesday of April in each and every year, and that he shall hold his office for the term of two years, equals in obscurity of design any act of the British Parliament passed since the days of the *Witena Gemote* of the early Saxons. But whether Lord Coke's rule should be applied, and the statute held void as against common reason and impossible to be performed, or whether the more temperate doctrine of Sir William Blackstone is applicable, which avoids such a law only as to that portion thereof giving rise to absurd consequences, on the theory that they were not foreseen by its framers, it is unnecessary to decide, since we have already declared it void on another ground.

This ruling disposes of all questions respecting the effect of the several provisions of the act except the repealing clause, which provides that "all acts and parts of acts inconsistent with this act are hereby repealed."

There are cases which hold that the repealing clause of an unconstitutional statute may stand and have effect, notwithstanding the invalidity of the rest of the act. But there is another class of cases, apparently based on sounder reason, which hold that the repealing clause is to be understood as designed to repeal all conflicting provisions, in order that the new statute can have effect; and where the statute itself is held to be invalid, nothing can conflict with it, and, therefore, nothing is repealed. Cooley's Constitutional Lim. p. 222 and cases cited.

We adopt the latter view in the present case, and hold the repealing clause void.

In view of the facts and the law arising thereon, we find as to the respondents cited to appear and answer the rule entered against them, that the election, by virtue of which they claim their respective offices, was void and of no effect, and that they have severally been guilty of intruding into the said offices. But as to said John D. Fleming, not having been served with process, his case is not before us, and no action concerning it is taken.

It is therefore ordered and adjudged that said W. W. Officer be, and he is hereby, ousted and altogether excluded from the said office of city clerk; that the said H. T. Sale be, and he is hereby, ousted and altogether excluded from the said office of city attorney; and that the said Edward Cuddihee be, and he is hereby, ousted and altogether excluded from the said office of city marshal of the said city of Leadville, and that each of them be excluded from all the franchises, privileges and emoluments thereof.

Rule made absolute.

PEOPLE EX REL. ELLIOTT V. GREEN.

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9 535

1. For an attorney to stop a judge of a court on the street, and use abusive language to him concerning any judicial action in a case pending before such judge, is such malconduct in office as will warrant the striking of his name from the roll of attorneys.
2. In such case it is not necessary that the indignity or insult to the judge should occur in open court, nor that it constitutes a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor.

In the Supreme Court.

THE case is stated in the opinion.

Attorney-General D. F. URMY, Mr. L. S. DIXON and Mr. L. C. ROCKWELL, for the people.

Mr. B. F. RICE and Mr. B. F. MONTGOMERY, for the respondent.

BECK, C. J. The petition of the Hon. Victor A. Elliott, judge of the district courts of the second judicial district of this state, recently filed in this court, charges the respondent, Thomas A. Green, a duly licensed attorney at law, residing in the city of Denver, with malconduct in his office as an attorney.

It charges that the respondent halted the relator as he was driving through the street with his daughter, a young lady, and addressed abusive, insulting and threatening language to him concerning his judicial action in a certain cause theretofore and still pending and undetermined in the district court of Arapahoe county, wherein the said Green was counsel for the defendants; that he accused said judge with tyranny and oppression in said cause; that said relator had procured its submission to a prejudiced judge for trial; and further, that the respondent assailed the relator with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers.

Upon the filing of the foregoing petition a rule was entered herein that the respondent be cited to appear and show cause why his name should not be stricken from the roll for misconduct in office.

The respondent appeared and answered the petition, and a hearing has been had. The answer admits that the facts contained in the petition, descriptive of the respondent's alleged conduct, are substantially true as stated, but denies that he entertained the motives therein charged against him, to wit: that he intended thereby to embarrass and intimidate the relator in the discharge of his official duties as judge of said courts, or to disgrace him as a judge.

There being no traverse of the substantial allegations of fact contained in the petition, for the purpose of testing the intentions of the respondent, an issue was framed presenting the question whether the respondent's conduct and language to Judge Elliott upon the street constituted such misconduct in his office as an attorney at law as to warrant this court in striking his name from the roll.

Upon the hearing the respondent was permitted to introduce testimony in mitigation of the offense charged against him, the same matters to be considered in justification, if adjudged admissible for that purpose. Testimony was likewise produced by the relator concerning the same matters of fact mentioned by the respondent's witnesses, and subsequently the case was submitted to the court upon the briefs and arguments of counsel for the respective parties.

Upon a careful consideration and review of the whole case, we are of opinion that the respondent's course has been unreasonable and unprofessional throughout.

Reprehensible as his conduct has been, there is little doubt that a retraction of his acts and words at any time prior to the submission of the case for our judgment, accompanied by a proper apology to the district judge,

manifesting a disposition to make suitable reparation for the indignity offered him, would have caused a dismissal of this proceeding.

But the attitude and bearing of the respondent have been, as to the relator, wholly defiant. His position is that he has done nothing wrong; that his conduct was justifiable, and that no occasion exists even for an apology on his part.

He makes the further point that the offensive language complained of, having been addressed to Judge Elliott out of court, the same does not constitute a statutory contempt, and for that reason it does not warrant the respondent's disbarment.

Such being his disposition and course in the matter, it only remains for us to declare the law applicable to the facts and circumstances of the case.

The language of the statute upon the subject of striking an attorney from the roll is broad and plain. It is: "The justices of the supreme court, in open court, shall have power, at their discretion, to strike the name of any attorney or counselor at law from the roll for misconduct in his office." General Statutes, page 136, section 5. The grave and delicate responsibility imposed upon this court, by the statute, is duly appreciated. The profession of an attorney is to him of the highest importance. It comprises his regular means of subsistence. No argument, therefore, is necessary to show that the power of striking from the roll should be most judiciously exercised. The case should be clearly made out to warrant a removal from the bar, and the removal should appear to be necessary either to the maintenance of that degree of respect which is due to courts and judges, or to preserve the respectability of the legal profession itself. The power should never be arbitrarily exercised.

It may be remarked, in this connection, that the statute not only vests this court with a discretion which may be exercised, but, by implication, it enjoins a solemn duty

upon the court, which, in a proper case, *must* be exercised.

Said Chief Justice Marshall, "This discretion ought to be exercised with great moderation and judgment, but it must be exercised." *Ex parte Burr*, 9 Wheaton, p. 529.

A proper regard for the integrity of our honored profession, and for the preservation of judicial authority, requires that indignities of this character to judges, on account of rulings made in court, be summarily dealt with. Inaction under such circumstances would be a warrant for the perpetration of a similar outrage whenever an unreasonable or evil disposed lawyer might adjudge himself aggrieved by judicial action.

The necessary effect of an indecisive course in such a case would be to impair confidence and respect in judicial authority, and embarrass the administration of justice.

The law has made ample provisions for the correction of judicial errors, and law-abiding attorneys avail themselves of such remedies when occasion requires. Those otherwise disposed must suffer the consequences of an injudicious course of action.

Concerning the respondent's motives, we have his denial that his real motives were those attributed to him by the relator. It is true respondent assailed Judge Elliott upon the street with low epithets, interspersed with charges of corruption and tyranny, accompanied by threats of exposure through the newspapers, all on account of his official action in a cause still pending in the district court, and on account of a publication concerning the same which criticised the course pursued by the respondent. But Mr. Green says he did not intend thereby to embarrass or intimidate the judge in the discharge of his official duties or to disgrace him as a judge.

We fail to discover anything in the case, however, which should except it from the operation of the usual rule of determining the motives by which human conduct is actuated, viz.: That the natural and probable

consequences of every act deliberately done were intended by its author.

The respondent was afforded an opportunity to prove on the hearing, in mitigation of his alleged offense, the affirmative allegations of his answer, that the district judge had treated him in an oppressive and tyrannical manner; that he had entrapped him into the submission of the Bosco-Smith case to a prejudiced and partial judge for trial, and that the relator caused the publication in the *Tribune* of a false and libelous account of the proceeding which occurred in court on the presentation by the respondent of his protest against further action before Judge Rogers. He signally failed to sustain upon the hearing any one of these allegations.

His conduct is not palliated by the plea of sudden passion, suggested by his counsel, which was incited upon reading the newspaper article referred to, for in the first place said article was not grossly false as alleged, and the supposed wrong done the respondent by its publication was more fancied than real. In the second place, Judge Elliott had distinctly informed him before the respondent gave vent to the tirade of abuse charged, that he was in no manner responsible for its publication. However angry he may have been upon reading the article, therefore, Judge Elliott having wholly disclaimed its authorship, no pretext remained on that account for his insulting words, and although uttered under excitement thus produced, his conduct was wholly inexcusable.

The right of lawyers, in common with other persons, to criticise in a legitimate manner the conduct and rulings of judicial officers is recognized, but this right never extends to nor justifies indignities to such officers concerning proceedings in court, which indignities would properly be characterized as outrages if perpetrated upon private citizens concerning other matters.

The respondent's objection to the jurisdiction of this court in this case is, in our judgment, not well taken.

It is not necessary that the indignity or insult to a judge should occur in open court, nor that it constitute a statutory contempt of court, in order to confer on this court jurisdiction to disbar therefor.

Bearing upon this proposition the views of Mr. Justice Field are in point: "The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. * * * Whatever may be thought, in such a case, of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll." *Bradley v. Fisher*, 13 Wall. 335.

Chief Justice Sharswood, of Pennsylvania, is equally positive upon the point. Says he: "No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court." *Ex parte Steinman*, 95 Pa. St. 220.

To the same effect are the views of Chief Justice English: "The power of the court to punish for contempt by fine and imprisonment is one thing, and its power to strike an attorney from the roll is another and distinct thing, although the misconduct for which an attorney may be disbarred may in some instances involve a contempt of court." *Beene v. The State*, 22 Ark. 151.

The *status* of the case then is, that the respondent has been guilty of conduct toward the relator, on account of the latter's judicial action in a cause pending in the district court, which warrants his disbarment, and he has produced no testimony which either justifies or mitigates his offense. This showing is greatly to be regretted, for

the respondent is a man in advanced years, an attorney of considerable practice and experience, and one whose demeanor in other courts appears to have been polite and respectful. To this effect is the testimony of Judge Hallett, of the United States district court, and of ex-Judge Dawson, late judge of the superior court of Denver. We may add, also, that the respondent's deportment in this court has always been exemplary. It is probable, therefore, that his conduct in the present instance has been the result of passion and of an unreasonable rather than a vicious disposition, when acting under excitement.

However this may be, his defiant attitude in this case, and his persistent attempt to justify conduct which is indefensible, leaves no alternative, in view of the law and the evidence, but to adjudge him guilty of malconduct in his office as an attorney. In consideration of his age and standing, however, we are disposed to deal as leniently with him as may be consistent with the maintenance of judicial and professional honor and independence in this state.

Whether or not this leniency shall be exercised, and how soon, must depend, to a great extent, on the respondent himself. Section 7, chapter VI, of the General Statutes, makes provision for restoring to the bar any attorney whose name may have been stricken from the roll by order of the supreme court.

The judgment of the court is, that the name of the respondent, Thomas A. Green, be stricken from the roll of attorneys.

Rule made absolute.

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35	428

PEOPLE EX REL. V. GREEN.

1. Proceedings for contempt may be termed a police regulation or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it, while proceedings for the disbarment of an attorney are intended to protect generally the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those intrusted with their legal business.
2. The power to act in connection with contempt is lodged with the court before or against whom the offense is committed. Authority for proceeding in disbarment is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession. The former is punished by fine or imprisonment, and may be largely *ex parte*. The sole penalty in connection with the latter is a prohibition from practicing in the courts of record, and this judgment can only be entered upon notice of charges preferred, and opportunity for defense. A contempt may constitute a ground for disbarment; but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt.
3. If a judge and attorney meet outside the court room and engage in an altercation about some matter in no way connected with judicial action, they are, and ought to be, upon precisely the same footing, in all respects, as other private citizens; when the attorney, by wilful misconduct toward a judge, on account of judicial acts, interferes with or impedes the dignified and proper administration of the law, or is guilty of conduct which tends to do so, whether in the court room or on the street, he is guilty of official misconduct.

In the Supreme Court.

Attorney-General D. F. URMY, L. S. DIXON and L. C. ROCKWELL, for the people.

Mr. B. F. RICE and Mr. B. F. MONTGOMERY, for respondent.

In this case, on petition for rehearing, the following opinion was delivered by

HELM, J. The importance of this case, and novelty of at least one question presented, must be my excuse for

restating, 'upon this application, our views somewhat in detail.

The complaints embodied in respondent's petition concerning his treatment in this court are, in our judgment, groundless.

He was given full notice of the charges preferred, and ample time to prepare his pleadings. The process of the court for procuring the attendance of witnesses was placed at his disposal; he was awarded a trial in open court, and the time was fixed to suit his convenience as well as that of relator; at the trial he was represented by able counsel, who managed his case with consummate ability; he was given the privilege of conducting the same in person, and, after electing to leave the general management to his lawyers, he was permitted to address the court himself upon the argument. Evidence supporting his allegations as to relator's oppressive treatment of third parties was excluded, but all proofs that were deemed proper, either in mitigation or in justification, were received and considered, and every doubt concerning the admission or rejection of testimony was resolved in his favor.

Upon this petition for rehearing, though an adjournment of the court for two weeks had taken place, he was, at his request, accorded the privilege of being heard by the judges at chambers in oral argument, both in person and by counsel.

Throughout these entire proceedings the court has adhered to its resolution that errors committed, if any, should be in his favor, and not against him. And now, upon a candid and careful review of the case, we cannot see where a single right has been abridged, a courtesy omitted, or a reasonable request denied him.

The relator in this case is judge of the second judicial district of the state; his petition, among other things, contains the following averments: That, "about nine o'clock A. M. of said December 1st, your petitioner and

his daughter, a young girl about sixteen years of age, were riding along Curtis street, in the city of Denver, when they met Mr. Green, to whom your petitioner spoke and bowed politely, and, at Mr. Green's request, stopped, when the following colloquy, in substance, took place. Mr. Green said:

" 'Did you have that article published in the paper about me?'

" 'To which your petitioner answered:

" 'No, sir; I did not.

" 'Mr. Green replied:

" 'If you did, an explanation has got to be made; I will not stand it. Perhaps your clerks caused it to be published at your instigation,' or words to that effect.

" 'Your petitioner again said:

" 'I have told you that I had nothing to do with causing that publication; and that is all I can say.'

" 'Your petitioner then started to drive on, when Mr. Green said:

" 'Wait a minute; I was going up to your house.'

" 'Your petitioner again stopped, and Mr. Green continued addressing your petitioner, and intending thereby to embarrass and intimidate your petitioner in the discharge of his official duties, saying in substance:

+ " 'I shall publish the whole affair; how you got angry upon the bench; how you imprisoned those poor men, and took money out of their pockets; you ought to have given us an honest judge to try the case; you are a tyrant upon the bench, but when you are attacked upon the street you are a coward, and dare not defend yourself. I will make it hot for you, you cowardly puppy.'

7 " 'Mr. Green said much more to the same effect, using and repeating the most offensive and insulting epithets to your petitioner, concerning your petitioner's official conduct. During this abusive tirade your petitioner made no reply, except remarking once or twice in a cool and indifferent manner:

“‘Very well, Mr. Green, publish as much as you please, and put it all in the newspaper, if you think it will do you any good.’

“And then your petitioner drove on, leaving Mr. Green talking offensively and excitedly.” * * *

In answer to the foregoing, respondent admits that his conduct and language, upon the street, were “in substance as reported by said Elliott in said petition.”

There is, therefore, no dispute whatever concerning the language used by both parties upon the occasion referred to; neither is there controversy about any of the attendant circumstances; admitting all that is charged, except as to his intention at the time, respondent declares that he was guilty of no official misconduct, and demands, at the hands of this court, vindication from the charge of misconduct in office.

The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power, for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the latter is intended to protect, generally, the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those intrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely *ex parte*; the sole penalty in connection with the latter is a prohibition from practicing in courts of record, and this judgment can only be entered upon notice of the charge preferred and a full hearing in defense; ample time for

preparation being given and all legitimate testimony being allowed and considered. A contempt may constitute ground for disbarment, but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt.

Upon some of the questions connected with the subject of disbarment, there is conflict of opinion among the decisions. The tendency has been, and is, to exercise the power only in extreme cases, and upon the most careful and thorough consideration. A few of the authorities go so far as to denominate the attorney's right to practice his profession, property, and to treat the same according to the full significance of that term.

Whether this position be correct or not, the disposition of the courts to afford him all reasonable protection in the proper exercise of this right deserves and receives the hearty commendation of all just and intelligent minds. But courts ought not to forget, in their anxiety to shield the attorney, the duty they owe to themselves, to the legal profession in general, and to that portion of society with whom they directly deal.

This case cannot be determined as a single controversy between two individuals. The questions are of general importance and application. Every other judge and every other lawyer is almost as much interested as are relator and respondent. Individuals are lost sight of. The issue tried bears directly upon the relations existing between the bench and bar of the entire state.

Before admission to the bar, in Colorado, applicants are required to present credentials of good moral character, and of intellectual fitness for the office. When admitted they become sworn officers of the law. Each subscribes to an oath that he will, "in all things, faithfully execute the duties of an attorney and counselor at law according to the best of his understanding and abilities." Their tenure of office is for life or during good behavior. Every license is accepted with full knowledge of

the unwritten condition annexed thereto, that for official misconduct it may be revoked at any time.

The power of revocation is, by statute, lodged in this court; and if upon a proper case we should hesitate to assume the grave responsibility and perform the unwelcome duty, we would be untrue to our official oath.

Under this oath, can we grant Mr. Green's request and vindicate him from all blame as a lawyer? Are we prepared to declare to the world that in this state every attorney who may imagine himself aggrieved by a judicial ruling, may, on account thereof, insult the judge upon the street, using the vilest epithets, and making the most violent threats concerning or affecting the past and future performance of his judicial duties? Nay, more, are we willing to admit that he may couple with such assault physical violence (for there is no distinction in principle between the two offenses, so far as this question is concerned); that he may repeat such assaults, verbal or physical, upon each and every adverse decision; and that no power exists to interfere with, or to prevent, these offenses by disbarment?

Ordinary civil or criminal actions are remedies utterly inadequate. Their official relations bring the parties into continual contact. The judge is compelled to make rulings from day to day, upon questions presented by the attorney. His rulings in that capacity are judicial findings, for errors in which ample relief is provided. An insult, or an injury inflicted upon him, on account thereof, is an insult or an injury to the cause of justice, and, if by a lawyer, also to the legal profession.

If a judge and attorney meet outside the court room, and engage in an altercation about some matter in no way connected with judicial action, they are, and ought to be, upon precisely the same footing, in all respects, as other private citizens; but when the attorney utters the threat, or makes the assault, on account of a ruling or decision in court, the situation is widely different. His

action has a direct influence upon the judicial mind; it is calculated to disturb and embarrass the proper administration of justice. The temple in which the lawyer is sworn to minister is not bounded by the walls of a court room; his official oath is not a robe to be worn only in presence of the court; and when he proves recreant to that oath by such wilful misconduct towards the judge, on account of his judicial acts, as interferes with or impedes the dignified and proper administration of the law, or tends to do so, whether in the court room or upon the street, *he is guilty of official misconduct*. Whether such misconduct justifies disbarment depends, of course, upon the facts and circumstances attending and surrounding each particular case.

But respondent undertakes to shield himself under the plea of freedom of speech, and a right to criticise. In this country, and in England also, the utmost liberty of speech is guarantied by statute and enforced by the courts; the right to discuss all matters of public interest or importance is everywhere fully recognized; judicial decisions and conduct constitute no exception to the rule; the judge's official character, and his acts in cases fully determined, are subject to examination and criticism; in most of the states the office is elective, and it is proper and right that the people should be informed of the occupant's mental and moral fitness.

True, under the guise of criticism in the public press, and otherwise, judges are often compelled to endure the sting of misrepresentation and calumny, with no other redress than an ordinary civil action; and doubtless it sometimes happens that their efficiency in office is thereby lessened, to the detriment and injury of the public service; but it is wisely considered better that these wrongs and injuries should be tolerated, than that the sacred liberty of speech, printed or spoken, should be abridged by lodging an arbitrary power to interfere therewith in the hands of the court or judge, so long as such

criticism or libel is not designed to influence the mind of the judge in a cause still undetermined.

There is a marked difference between the attorney and the non-professional citizen; the former is as much an officer of the court as the clerk or sheriff, and his oath of office should lead him at all times and in all places to encourage and strengthen the judges and courts in the discharge of their official duties; but so far as this liberty of speech in connection with judicial action is concerned, his official character in no way affects him; he may talk with his neighbors, and freely comment upon the judge's official conduct in matters no longer pending, and he may criticise the same through the public press; for such acts he will be answerable only as other citizens are.

But we have found no case, and respondent has cited none, which extends this privilege of comment and criticism to assaults, verbal or physical, upon the judge in person.

If a case like the one before us were found, in which the court exonerated the attorney from official reproach, we should hesitate long before following it.

The assault upon the judge in person, the vile epithets and threats addressed to him, cannot be justified or excused under the right of criticism, nor upon the plea of educating or informing the popular mind concerning his official acts.

We may accept the law as stated by counsel for respondent in their able brief upon this petition for rehearing.

We may say with them that our power to disbar is confined to the statutory causes, and that it can only be exercised for misconduct *in office*, though both of these propositions are ably controverted.

In *Beene v. The State*, 22 Ark. 156, the court, per Chief Justice English, says: "Conceding that it does not appear that the offense is embraced by the statute, yet if the plaintiff made a personal attack upon the judge on

account of his action as such, * * * there can be no doubt that he deserved to be stricken from the roll for such flagrant misconduct, and that the circuit court has the inherent power to disbar therefor, though the offense be not embraced in the statute." And in *The People ex rel. Hughes v. Appleton*, 105 Ill. 481, under a statute like our own, the court declare that: "It is not to be held that there are not exceptions; that there are no cases where an attorney's misconduct, in his private capacity, merely, and not in his official capacity, may be of so gross a character that the court will exercise the power of disbarment. There is too much authority to the contrary to say that." But it is unnecessary for us to dwell upon this subject, for the issue submitted for trial restricts us in this case to the question of inflicting the penalty for official misconduct.

We may accept counsel's further statement of the law, and admit that the misconduct must have been "designed and calculated to influence and affect the judge judicially in the discharge of his official duties."

With this law in view, let us briefly examine the specific acts and language of respondent above described and stated.

An article had appeared in one of the morning papers reflecting upon the conduct of respondent in the district court the day before. The article was signed by no one, and the district judge, according to the evidence, had no connection whatever with the paper or its management.

Respondent believed himself misrepresented and wronged; he also seems to have thought that relator was in some way responsible for the publication.

With the paper in his hand he sought out the judge, and made the verbal assault upon him.

The article described a scene in court during the progress of a trial; it criticised Mr. Green's conduct as an attorney; and the wrongs inflicted thereby, if any, were in his official capacity. The threats made by him to re-

lator were to publish proceedings with which his sole connection was that of counselor or attorney.

The entire street transaction, therefore, grew out of, and had direct reference to, the judicial action of relator and the official conduct of respondent.

Respondent claims that his purpose in seeking the interview was to procure from Judge Elliott a statement for publication which should redress the professional wrong inflicted upon him and prevent the injurious consequences of the article to his professional business; the object of the interview, therefore, was to benefit himself in his *official*, and not in his private, capacity.

But these deductions are needless, for we have declared above that an attorney is bound by the solemn obligation of his oath to assist the court in its efforts to appropriately administer the law, and that when he is guilty of such wilful acts toward the judge as are calculated to embarrass and impede these efforts, he is guilty of official misconduct.

Hence, the only question for consideration is, whether respondent's language or conduct was "intended and calculated" to have this effect.

Let us see; his words to Judge Elliott were: "I shall publish the whole affair; how you got angry on the bench; how you imprisoned those poor men, and took money out of their pockets; you ought to have given us an honest judge to try the case; you are a tyrant upon the bench; but when you are attacked upon the street you are a coward, and dare not defend yourself. I will make it hot for you, you cowardly puppy."

Respondent's language in calling relator a cowardly puppy, and declaring that he dare not defend himself when attacked upon the street, seems to indicate that he desired to engage relator in a common street brawl and fight. But this conduct would be so highly unprofessional, that we gladly accept his disclaimer of any such intention.

Passing this, therefore, and also the cruel charge against the judge of another court, who had kindly consented to try a troublesome case, without the slightest obligation to do so, and what do we reasonably understand from the rest of respondent's language?

What does he mean when he says, "I will publish the whole affair; how you got angry on the bench," etc.?

The "affair" referred to, and the imprisoning and taking of money, were all occurrences in court; the threat was to publish these things and thus make it "hot" for Judge Elliott. What did respondent mean by declaring that he would make it hot for relator? Did he make these threats for the purpose of inducing relator to right the wrongs, fancied or real, inflicted by the newspaper article? or was it his intention thereby to inform relator that he would disgrace him before the public; that by means of the press he would hold up to scorn and ridicule relator's judicial action, and that he would thus degrade relator's judicial standing, lessen the respect due to his position, weaken his influence and efficiency upon the bench, and make it hot for him, *i. e.*, annoy and embarrass him in the discharge of his official duties?

It seems to us now, as it did when the former opinion was written, that there can be no reasonable doubt as to respondent's intention when he uttered these words.

We do not speculate as to whether the publication threatened, had it been made by respondent, would have produced these results.

We are only considering respondent's intention and the reasonable tendency or consequence of his acts.

What effect were these threats calculated to produce? Obviously, either to anger and exasperate, or to intimidate the judge in the performance of his judicial labors.

Judges are as sensitive about insult and injury after as before they begin wearing the judicial ermine; as much as the demand for integrity and ability upon the bench exceeds the demand for like qualities in private life, so

much deeper is the sense of injury when these qualities in their official character are called in question. It is the judge's constant endeavor, as it is his duty, to rise in his judicial acts above the influence of passion or prejudice, and to put away from him while upon the bench all thought of personal wrong or injury; but until he is clothed with celestial attributes, he will not always be able to accomplish this desired end.

Whether respondent's threats and epithets were calculated to intimidate, or whether they tended to exasperate and anger Judge Elliott, is a matter of but little moment; for in either event, their natural tendency was to annoy and embarrass him in the discharge of his official duties, and thus to interfere with the administration of justice in his court.

Upon the theory that respondent was angered by the newspaper article, and made the attack in a sudden heat of passion, we invited him to offer evidence in mitigation; but considering his proofs, in connection with all the circumstances attending the transaction, we are unable to discover anything to materially palliate the offense; it was committed after he had been informed that the judge had nothing to do with the publication, and knew nothing about it until he read the morning paper.

If, therefore, respondent uttered the epithets and threats to relator in a heat of passion produced by the article, that passion was so unreasonable as to furnish no adequate excuse. But it is sufficient on this subject to say, that though three and a half months have passed since this transaction occurred, respondent still denies the slightest obligation on his part to offer any apology or reparation whatever to relator *as a judge*. Respondent's view of the transaction is that it had no official character or significance whatever; in this view, as already shown, we cannot concur. But, governed thereby, he has, throughout the entire proceedings, including his argument upon this rehearing, maintained the position

that he displayed no want of *official* decorum, and that not the slightest discourtesy was offered to relator in his judicial character.

A word as to respondent's punishment, and I shall have done. He alleges that it is "grossly oppressive and out of all proportion to the offense charged."

His construction of the law is that this court has no power to inflict any other penalty than disbarment; that, under the statute, we are compelled to disbar or acquit him. His last words in argument were an expression of his personal preference for disbarment rather than any lighter judgment, and a demand for this or acquittal. We believe, under all the circumstances, particularly in view of his unyielding attitude, that disbarment was not too severe a punishment for the offense committed; we certainly could not acquit him of all official blame.

Therefore, painful as the duty was, we acceded to his positive and persistent demand.

We are unanimously of the opinion that the rehearing should be denied.

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Rehearing denied.

ANDERSON ET AL. V. BARTELS.

7	256
11	71
7	256
17	272
7	256
24	260
24	266

1. In an action of ejectment for the possession of real estate, being part of a town site on the public domain, a deed which is regular upon its face, and executed by the officer intrusted by the government with the legal title, and duly authorized to convey it, is not impeachable for failure to comply with any preliminary requisites.
2. In such case the doctrine of presumptions in favor of official acts obtains, that the officer empowered by law to make the grant did his duty in all respects, and had required the grantee to show, by legal proofs, that he had complied with all rules and regulations necessary to be complied with to entitle him to the deed.
3. The execution and delivery of such a deed to a portion of the Denver town site, under the provisions of the laws in relation to the subject, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title.

4. Where no defect of title or authority exists, and the land is subject to sale, it is held that the officers of the land department, in the course of their duties, exercise a judicial function, and their acts cannot be impeached in a collateral action; and in this case, *held*, that the duties and powers of the probate judge were not merely ministerial, but that in executing the provisions of the congressional and legislative acts relating to the grant he was called upon to and required to exercise judicial discretion and powers.
5. An instruction is fatally erroneous which contains one correct and one incorrect proposition respecting the legal effect of the evidence produced on the trial, and which tells the jury that, if the evidence sustains either proposition, the verdict must be for the plaintiff.

Appeal from County Court of Arapahoe County.

THE facts are stated in the opinion.

Mr. L. B. FRANCE, for appellants.

Messrs. BUTLER and ROGERS, and Messrs. BARTELS and BLOOD, for appellee.

BECK, C. J. This was an action of ejectment, brought by the appellee, Caroline H. Bartels, to recover possession of lot 6 of block 63, in the east division of the city of Denver. It was originally instituted against the defendant Anderson only, the complaint alleging that Louis F. Bartels, deceased, died July 27, 1874, seized in fee of said lot, and, by his last will, devised the same to the plaintiff for and during her life, or until she again married. That she has not since married; that on September 1, 1874, while plaintiff was seized in fee and entitled to possession, the defendant, without right or title, entered upon the lot, ejected the plaintiff, and still withholds the possession from her.

Anderson answered, denying that Louis F. Bartels was, in his life-time, seized of the property, and averring that said defendant entered upon the premises September 1, 1878, as tenant of his co-defendant, Caroline E. Downing, and has continued in possession to the present time.

Caroline E. Downing, who was made a co-defendant on her own motion, also answered, denying the title alleged in Louis F. Bartels, and the title and right of possession of the plaintiff, and averred that she, long prior to September 1, 1874, was seized in fee of the premises, and, long prior to that date, was in lawful possession thereof as the owner in fee.

The cause was tried to a jury, the trial developing the fact that both the plaintiff Bartels and the defendant Downing claimed title from the same source, viz., by deeds from the probate judge of Arapahoe county.

The jury returned a verdict in favor of the plaintiff, Caroline H. Bartels, on which judgment was entered that she recover the lot and premises in controversy, and that a writ of restitution issue therefor.

This lot comprised a portion of the original town site of the city of Denver, entered by James Hall, probate judge of Arapahoe county, on the 6th day of May, 1865, by virtue of the special act of congress, "for the relief of the citizens of Denver," approved May 28, 1864. 13 Statutes at Large, 94.

The plaintiff, to maintain the issues on her part, introduced the following conveyances, to wit: United States to James Hall, probate judge, patent for said town site, dated July 1, 1868, which recites the entry of the land in trust for the several use and benefit of the occupants thereof, according to their respective interests, under the act of congress aforesaid, and to his successors and assigns in trust as aforesaid.

James Hall, probate judge, to Omer O. Kent, successor in office, same tract, March 16, 1867. Omer O. Kent, probate judge, to Jacob Downing, successor in office, same tract, August 31, 1867. Jacob Downing, probate judge, to Henry A. Clough, successor in office, same tract except the executed part of the trust, September 23, 1869. Henry A. Clough, probate judge, to Louis F. Bartels, the lot in controversy, by virtue of a sale, in

pursuance of the territorial act of February 8, 1872, and previous legislation, dated October 29, 1872.

It was then admitted that the plaintiff is the heir of Louis F. Bartels, deceased.

Objections were made and exceptions saved to the admission of deeds from Downing to Clough, and from Clough to Bartels.

The defendant Caroline E. Downing, to maintain the issues on her part, introduced certified copies of the following deeds to said lot:

Jacob Downing, probate judge, to Morris B. Foy, October 3, 1868.

Morris B. Foy to Samuel N. Hoyt, July 9, 1869. Samuel N. Hoyt to Jacob Downing, June 28, 1870. Jacob Downing to Daniel C. Oakes, June 10, 1871. Daniel C. Oakes and wife to Caroline E. Downing, January 3, 1873; which deeds were received in evidence.

Defendant then offered in evidence certified copies of the following conveyances:

A certificate of one share in Denver City to William Clancey, issued by E. P. Stout, president, and William Larimer, secretary, bearing date March 31, 1859.

Deed from William Clancey to William Marchant, dated November 1, 1859.

Deed from William Marchant to D. A. Johnston, dated June 4, 1861, all of which conveyances were rejected, and exceptions to the rulings saved.

The said defendant then introduced a tax deed for said lot in evidence, executed by James M. Strickler, treasurer of Arapahoe county, to Jacob Downing, dated February 11, 1875, by virtue of a tax sale for delinquent taxes of the year 1871.

Testimony was introduced, showing that D. A. Johnston built a small house partly upon this lot, late in 1871, or early in 1872, and that he executed a lease of the premises to tenants, July 1, 1872.

The said defendant then offered to prove that Johnston

was in the occupation of the premises in the fall of 1871, and continued in the occupation thereof until 1875, when he conveyed the same to the defendant Downing, and that she continued in the occupation thereof until the commencement of this suit, and is still in the occupation thereof. This offer was rejected as immaterial, to which ruling an exception was reserved.

The plaintiff was permitted to introduce testimony in rebuttal, for the purpose of impeaching the title derived by Caroline E. Downing, by mesne conveyances from Jacob Downing, probate judge, on the ground that the deed executed by said probate judge to Morris B. Foy was not executed in conformity with the acts of congress and the acts of the legislature of Colorado relating to the execution of the trust vested in the probate judge.

Said plaintiff was also permitted to introduce evidence to show that said deed was fraudulently issued by said probate judge, there being no such person as the said grantee, Morris B. Foy.

The jury were instructed, substantially, that the conveyances introduced by the plaintiff made out a *prima facie* case in her favor, entitling her to recover.

They were told to disregard the outstanding title acquired through the tax sale; and as to the title derived by the said defendant, by conveyances from Downing, probate judge, that it constituted a complete defense to the action, unless they found from the evidence that no such person as the said Morris B. Foy existed, or that he had not, by himself or agent, filed his claim to the lot in question with the probate judge on or before the 10th day of August, 1865; but that if they found either of the last mentioned facts to be true, the deed to Foy was fraudulent and void, and the verdict must be for the plaintiff.

The controlling questions presented by this record relate to the admission and exclusion of testimony, and to the instruction referred to.

The plaintiff produced in evidence a regular chain of conveyances from the government down to herself; the defendant Downing, an equally regular chain of title from the same original source to her.

No error occurred thus far in the admission of testimony.

The defendant's offer to introduce a title derived from the Denver Town Company was properly rejected, and the jury correctly instructed to disregard the tax title. The former could not, in any view of the case, prevail over the title derived by the plaintiff by mesne conveyances from the government, and the latter was void for the reason that the property was not liable to taxation at the time it purported to have accrued. Equally incompetent, as against the plaintiff's title, was the offer in this action to prove the occupation and improvements of D. A. Johnston, and his conveyance to said defendant. There was no way of deriving title except as pointed out by the congressional and territorial acts, and none of the rejected testimony constitutes a title thereunder. *Clayton v. Spencer*, 2 Col. 380.

This narrows the contest down to the title vested by the United States in the probate judge of Arapahoe county, and the two chains of title proceeding from that functionary; one to the plaintiff, through deed of Henry A. Clough, probate judge, to Louis F. Bartels, bearing date October 29, 1872; the other to the defendant, through deed of Jacob Downing, probate judge, to Morris B. Foy, bearing date October 3, 1868.

The deed from Clough, probate judge, was executed on the assumption that the title of the lot in controversy had not passed by the deed from Downing, his predecessor in office, to Foy, and is supposed to have been authorized by the territorial act, approved February 8, 1872, entitled "*An act to provide for the further execution of the trust relating to the city of Denver, and to regulate the same.*"

This act required the probate judge to make a list of all parcels of land embraced in the patent to the town site, to which claims had not been filed on or before August 9, 1865, specifying certain reservations and exceptions, and, upon completion of the list, to advertise and sell said parcels at public vendue to the highest bidder for cash.

Notice was required to be given of the time when the probate judge would commence to make the list, and when sitting for that purpose, the city attorney or any citizen had a right to be present, and to suggest, by petition, that lots or lands had been omitted from the list, and that filings which appeared to have been made on or before the 9th day of August, 1865, were in fact made after that time. Upon presentation of such petition, continues the act, "it shall be the duty of said probate judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same."

In pursuance of said act, Probate Judge Clough prepared a list of lots for public sale, including the lot in controversy, and the latter was struck off and sold, as before stated, to said Louis F. Bartels.

In order to sustain the title thus acquired, it was necessary for plaintiff to show the invalidity of the prior conveyance by Judge Downing. For this purpose she was permitted to introduce testimony tending to show that the preliminary steps and conditions, requisite to a valid conveyance, had not been complied with prior to the execution of the deed by Judge Downing; also, evidence to show that said deed was fraudulently executed, there being no such person as Foy, the grantee.

We think the court erred in permitting an inquiry to be instituted, under the pleadings in this case, into the question whether the necessary preliminaries had been

observed prior to the execution of the deed by Judge Downing. It was strictly a legal action, no equitable issues being presented by the pleadings. The complaint contained no prayer for equitable relief, nor any allegations to notify defendant that the regularity of the incipient steps required to obtain a deed from the probate judge would be called in question. The deed was regular upon its face, and purports to have been executed to the person found to be entitled thereto, under the laws of congress and the statutes of Colorado. It was executed by the officer intrusted by the government with the legal title, and duly authorized by law to convey it.

In such case a deed is not impeachable in a legal action for failure to comply with any preliminary requisites. The doctrine of presumptions in favor of official acts obtains, that the officer empowered by law to make the grant did his duty in all respects, and had required the grantee to show, by legal proofs, that he had complied with all rules and regulations necessary to be complied with to entitle him to the deed. 1 Phil. Ev. *604.

The execution and delivery of a deed to a portion of the Denver town site, by the probate judge, under and by virtue of the several acts and provisions of law in relation to the subject, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title. In such case, if there was an absolute want of power to issue the patent, as if the grantor had no title to the thing granted, or if the sale is not authorized by law, the land having been reserved from sale, the title set up under the grant is void *ab initio*, and the fact may be shown in an action at law. But if the grant is merely voidable, it can only be impeached in an equitable action. *Sherman v. Buick*, 3 Otto, 209; *Stoddard v. Chambers*, 2 How. 318; *Easton v. Salisbury*, 21 How. 426.

Where, however, no defect of title or authority exists,

but the land is subject to sale, it is held that the officers of the land department, in the course of their duties, exercise a judicial function, and their acts cannot be impeached in a collateral action.

Judge Field says, in *Smelting Co. v. Kemp*, 14 Otto, 640: "In the course of their duty, the officers of that department are called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not only operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions attending it are not open to rebuttal in an action at law."

The same rule is held applicable to state grants or patents. In the case of *Polk's Lessee v. Wendal*, 9 Cranch, 87, Chief Justice Marshall makes the inquiry, "Is it in any, and if in any, in what, cases allowable, in an ejectment, to impeach a grant from the state for causes anterior to its being issued?"

He then refers to the facts that laws provide safeguards for the protection of the incipient rights of individuals, and to protect the state from imposition as well;

that officers are appointed to supervise the proceedings, and to execute the grants under rules prescribing their duties, and his conclusion is expressed in these words: "When all the proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent."

He holds that the remedy of one injured by a violation of the law and rules of procedure is in equity, and assigns the following reasons therefor: "On an ejectment the pleadings give no notice of these latent defects of which the party means to avail himself; and should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity, the specific points must be brought into view; the various circumstances connected with these points are considered, and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation, and the decision of the court in the last resort upon them is decisive."

Now, in the application of the foregoing principles to the case under review, it is to be observed that the Denver town site was located upon lands belonging to the United States. Numerous claimants had located upon separate parcels thereof, built houses, and otherwise improved the same, and become, under the law, entitled to conveyances. The government, instead of issuing patents to the several claimants, and instead of granting the tract to the territorial organization, transferred the title of the entire tract to the judge of the probate court of

Arapahoe county, in trust for the parties entitled to conveyances. By the terms of the grant, the probate judge was the officer and representative of both the federal and the territorial governments in the disposal of these lands. He was invested with functions analogous and similar in character to those of the land department of the general government, or of the officers of a state, charged with the same class of duties.

His duties involved the hearing and consideration of testimony concerning the rights of claimants, and passing upon its competency, credibility and weight. It also involved judicial trials before him, in certain instances, wherein he was required to render judgments, from which appeals might be prosecuted to the supreme court of the territory.

The congressional act of May 28, 1864, authorized said judge to execute the trust thus reposed in him, by the disposal of the lots and parcels of land in accordance with rules and regulations to be prescribed by the territorial legislature.

The legislative act of March 11, 1864, required him to convey the several parcels to the persons entitled in law or equity to the possession thereof, at the date of the entry of the town site, or to his, her or their heirs or assigns. In certain instances, he was required to summon adverse claimants before him, and, after hearing their proofs and allegations, to determine the controversy between them. In such cases, if a person failed to appear before him when duly summoned, he was forever barred from asserting any right, title or interest in the grant.

By the legislative act of February 8, 1872, he was invested with other and further judicial powers relating to said grant.

When a petition was presented, setting forth that the petitioner had acquired title in good faith, and without notice of defects therein, to lots or lands listed for sale

under said act, and that the petitioner had built a house thereon, the probate judge was required to set the petition down for hearing; to impanel a jury of six men, if required by the petitioner or by the city attorney; and if, upon the trial, the facts stated in the petition were found to be true by the court or jury, as the case might be, the premises were to be withdrawn from sale, and a deed executed to the petitioner.

These examples show that the duties and powers of the probate judge were not merely ministerial, but that, in executing the provisions of the congressional and legislative acts relating to this grant, he was constantly called upon and required to exercise judicial discretion and powers.

As to any parcel of land, therefore, wherein the trust has been consummated by the execution of a deed, the same presumptions obtain that all preliminary requirements have been complied with, and the same reasons exist for holding these presumptions conclusive, and not open to rebuttal in actions purely legal, as exist in the cases of federal and state grants.

If a deed has been executed by the probate judge to one not entitled to it, the remedy of the injured party is a direct proceeding to set it aside, or for other equitable relief consistent with the facts and circumstances of the particular case.

The deed to Morris B. Foy is not void upon its face. Non-compliance with the law on part of the grantee renders it voidable only, and for these reasons we are of opinion that the court below erred in the admission of testimony to impeach the preliminary proceedings, and to contradict the proofs upon which the probate judge acted in adjudging the said Foy entitled to the deed.

The citation from *Smelting Co. v. Kemp*, 14 Otto, 649, relied upon by counsel for defendants in error to support the rulings below, is not in point. The paragraph referred to mentions two instances in which it is proper,

when patents are offered in evidence, to introduce the record of the initiatory proceedings: First, when there is a contest between two patentees for the same land; a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps. The other instance was under a state statute declaring a patent void, where no entry, as an initiatory proceeding, has been made. The ruling upon this point is, that, if the patent is silent on the subject, it is competent to show that the initiatory step was not taken at all.

But there is no warrant in the opinion for the position assumed in this case, that the record of the original and initiatory proceedings may be produced, and then contradicted and impeached in an action at law. On the contrary, the doctrine of the whole case is that the records of the original proceedings are conclusive in actions of this character. The language of the court is: "The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If, in issuing a patent, its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief," etc.

The deed of the probate judge, in this instance, cannot be said to be wholly silent as to the rights acquired by the grantee through initiatory steps taken by him. It recites that he "is justly entitled to the lot * * * as the rightful occupant thereof, and the *bona fide* owner of the improvements thereon, under the provisions of said act of congress."

While it does not state the date of his filing, it is an official declaration that the grantee has been adjudged entitled to the deed.

If the deed was executed and delivered to a *bona fide* grantee, in pursuance of this adjudication, it was not subject to investigation or impeachment in this action. *Smith v. Pipe*, 3 Col. 187.

The production in evidence of the claim purporting to have been filed by Foy shows, if genuine, that it was filed in time, its date being June 8, 1865. It was not competent to admit testimony to show that the filing was not in fact made prior to August 10, 1865, or that the lot was not occupied or improved until long after said filing purports to have been made.

The court also erred in instructing the jury that, if they believed, from the evidence, that no such person as Morris B. Foy ever existed, or that his claim was not filed on or before August 10, 1865, and that the filing produced in evidence was not made until long after that time, they must find for the plaintiff.

An instruction is fatally erroneous which contains one correct and one incorrect proposition respecting the legal effect of the evidence produced on the trial, and which tells the jury that, if the evidence sustains either proposition, the verdict must be for the plaintiff. It renders it impossible to know upon what finding of facts the verdict is based.

The latter branch of the above instruction is clearly erroneous as to its application to this case, while the clause relating to the non-existence of Foy states a correct proposition of law. But there is no way of ascertaining whether the verdict is based upon the evidence tending to show that the claim was not filed in time, or upon the evidence that no such person as Foy was ever known to exist. If there was no grantee capable of taking the title, it certainly could not pass. "A grantee is as necessary to the conveyance of land as a grantor, and it follows that a grant to a fictitious person is simply void." *United States v. Southern Colorado Coal & Town Co.*

1 Denver Law Journal, 299; 4 Col. L. R. 169, and cases cited.

But since we cannot say that this fact was found by the jury, the judgment must be reversed for the errors pointed out.

Reversed.

BASSETT V. INMAN.

7	270
9	399
7	270
14	375
7	270
4a	437
7	270
5a	463
5a	492
7	270
24	27
7	270
31	182
7	270
37	157

1. There is no prescribed form for making a claim of exemption of property from levy under attachment.
2. A traverse of the affidavit in attachment does not waive the right to claim the property attached as exempt.
3. Upon appeal from a judgment of a justice of the peace the cause stands in the county court for trial *de novo*.
4. Where the plaintiff failed to present in the court below the fact that a part of the debt in suit was the purchase price for the property attached, as against the statutory exemption claimed, he cannot raise it for the first time in this court.
5. The assignee of a note and account sued upon must be deemed "the real party in interest," under the code, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee.
6. Where it is apparent that the party complaining is not prejudiced by an improper instruction given to the jury, the verdict will not be set aside.

Error to County Court of Saguache County.

BASSETT, the plaintiff in error, commenced his action in attachment, against the defendant in error, before a justice of the peace of Saguache county, upon a promissory note alleged to have been executed and delivered by defendant in error to one Roney, and by the latter assigned to plaintiff in error; also, upon an account due from defendant in error to one Fry, and assigned to plaintiff in error. The defendant filed a traverse of the affidavit in attachment, and also on the same day an affidavit claiming the property attached as exempt from

levy. The attachment was dissolved and the cause dismissed by the justice, and the plaintiff in error appealed to the county court. Upon trial had in the county court, the attachment was dissolved on motion of the defendant in error, but the plaintiff had judgment on the verdict of a jury, for the sum of \$129.11, and thereupon the plaintiff sued out this writ.

Mr. E. F. ALLEN and Mr. GEORGE P. UHL, for plaintiff in error.

Mr. CLARENCE P. LOTT, for defendant in error.

STONE, J. The principal ground of reversal relied upon by the plaintiff in error is the dissolving of the attachment sued out by the plaintiff below, who is the plaintiff in error here. The objection to the action of the court in dissolving the attachment is based upon the following reasons, to wit:

"First. That the affidavit claiming exemption is insufficient."

"Second. Because there was no notice given to the plaintiff of the filing of the affidavit claiming exemption."

"Third. Because the claim of exemption, if any ever existed, was waived."

"Fourth. Because the court had no jurisdiction of this matter, the same not having come up on appeal, and that, therefore, the court erred in dissolving the attachment."

These alleged reasons are insufficient to support the objection urged. There is no prescribed form for making such claim of exemption, and it might have been made orally in the justice's court. It was made in the form of an affidavit by the defendant in the attachment, describing the property as the span of mules and harness taken under the attachment writ, and claiming them as exempt under the statute. No notice of the filing of this affida-

vit was necessary, any more than in making any other defense which the defendant was entitled to make to the action. The notice referred to in § 12 of the attachment act of 1879 applies to cases of claimants of the property other than the defendant in the suit, usually called intervenors. The proceedings mentioned in § 13 of said act refer to the mode and manner of trying the question of the right of exemption claimed, when an issue is made thereon.

The ground of the alleged waiver of the exemption is that the defendant first traversed the attachment upon other grounds, and afterwards filed his affidavit, claiming the exemption as a separate ground for dissolving the writ. This was no waiver of the right of defendant to claim the property as exempt under the statute.

The jurisdictional objection is without force. Upon appeal in the county court the case stood just as it existed in the justice's court, and the trial in the county court was *de novo*, where the defendant's claim of exemption was to be passed on the same as any other matter of defense made in the case.

It is said by counsel for plaintiff, in argument, that the testimony in the record shows that one of the items sued for was a balance due for the purchase price of the mules attached in the suit, and hence, that, had the court allowed a proper issue to be made upon the claim of exemption, the plaintiff would have succeeded in resisting said claim.

It is questionable if this point is properly raised under any of the assignments of error; but, even if it is, we think it unavailing to plaintiff here, for the reason that he failed to make this point in the court below. The only grounds upon which the plaintiff resisted the claim of exemption in the court below, when the motion to dissolve the attachment upon the ground of the exemption was before the court, were the four specific grounds which we have hereinbefore set out and discussed, and

the plaintiff, having failed to present in the court below the fact that a part of the debt in suit was the purchase price, or a portion thereof, for the property attached, as against the *statutory* exemption claimed, must be held to have waived this ground of objection to the motion, and cannot raise it for the first time in this court.

The plaintiff, as assignee of the note and account sued upon, was "the real party in interest," within the meaning of the Code of Civil Procedure, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee. *Cummins v. Morris*, 25 N. Y. 625; *Meeker v. Cleghorn*, 44 N. Y. 349; *Caulfield v. Saunders*, 17 Cal. 569. The jury were properly instructed upon this point by the instructions given on behalf of plaintiff.

The third instruction given on behalf of defendant, the giving of which is made a ground of error in the assignments, was inconsistent with that given upon the same point on behalf of plaintiff, and was also inconsistent with the facts to which it was intended to apply, and therefore objectionable; but that the plaintiff was not prejudiced thereby is evident from the verdict rendered in his favor, in accordance with the instructions given on his behalf.

This is none the less evident from the fact that the verdict was for a less amount than that sued for, since a large item in the account for the potatoes delivered to defendant was in dispute, and the testimony relating thereto directly contradictory; and as the jury were the judges of the credibility of the witnesses and the weight to be given to their testimony, we cannot say that the verdict was unwarranted, and the judgment of the court below will be affirmed.

Affirmed.



COHEN V. THE PEOPLE.

1. An indictment for a statutory offense is sufficient which charges the offense in the language of the statute, or so plainly that the nature of the offense can be easily understood by the jury.
2. Upon the trial of one indicted for forgery it is not error to admit evidence tending to prove that the defendant uttered or passed the forged instrument.
3. The statute makes the offense of forgery to consist in the forging or counterfeiting the handwriting of another with the intent to damage or defraud some person.

Error to District Court of San Juan County.

THE case is stated in the opinion.

Messrs. MONTAGUE & WILSON and Mr. SAMUEL SLESINGER, for plaintiff in error.

Attorney-General D. F. URMY, for defendant in error.

STONE, J. The plaintiff in error was tried and convicted in the court below upon the following indictment:

"The grand jurors selected and sworn within and for the county of San Juan, in the name and by the authority of the people of the state of Colorado, upon their oaths, present that M. K. Cohen, late of the county of San Juan, aforesaid, on, to wit, the 3d day of January, 1882, at the county of San Juan, and state aforesaid, did counterfeit and forge the handwriting of another, to wit, Lawsha Brothers, to a certain promissory note of the date of January 3, 1882, for the sum of \$460, with the intent to damage and defraud the said Lawsha Brothers, and Heffron & Johnson, and against the statute in such case made and provided, and against the peace and dignity of the state of Colorado."

Numerous errors are assigned as grounds for reversal of the judgment, only a few of which it is necessary to notice.

The indictment is objected to as insufficient, for the reason that it fails to set out a copy of the instrument upon which the forgery is predicated, and because the act is not charged to have been done "falsely and feloniously."

The first clause of the statute, upon which the indictment is founded, declares that "every person who shall falsely make, alter, forge or counterfeit any record, * * * promissory note," * * * etc. While the latter clause is as follows: * * * "or shall counterfeit or forge the seal or handwriting of another, with intent to damage or defraud any person, * * * every person so offending shall be deemed guilty of forgery," * * * etc. Gen. Statutes, sec. 775.

This indictment is drawn upon the latter clause of this section of the crimes act, and, as is seen, is framed in the language of the act, and hence it was not essential to use the words "falsely make," or to set out the instrument, as might possibly be required under the definition of the crime in the first clause. Nor was the use of the word "feloniously" necessary. This term is employed, in charging a felony, for the purpose of denoting the intent with which the act is charged to have been done. The clause of the act under which this indictment is framed expresses the intent necessary to constitute the offense, and hence renders superfluous the use of the term felonious. Besides, forgery was a misdemeanor at common law, the term felonious being alleged only in respect of crimes denominated felonies, which deprived the accused of the benefit of clergy upon conviction, and for this reason it has been held by the courts of several states that the term felonious need not be used in indictments for forgery, especially states where, by statute, it is provided, as in this state (sec. 925, Gen. Statutes), that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this code, or so

plainly that the nature of the offense may be easily understood by the jury." *Miller v. The People*, 2 Scam. 233; *Butler v. The State*, 22 Ala. 43; *Quigley v. The People*, 2 Scam. 301; *Jane v. The Commonwealth*, 3 Met. (Ky.) 18; *Peek v. The State*, 2 Humph. 77; *People v. Olivera*, 7 Cal. 403; Wharton, Crim. Law, secs. 399, 400, 1419.

It is also assigned as error that the court admitted testimony as to the uttering or passing of the instrument forged, since such passing or uttering was not charged in the indictment. There was no error in this, for the indictment, having charged the offense under that clause of the statute, expressing the particular intent constituting the criminal ingredient of the act, it was proper to show that the accused uttered or passed the instrument for the purpose of raising money thereby, in order to show the intent with which the handwriting in question was forged. This, at least, was one mode, and a proper one, of establishing or tending to show the particular intent expressed in the statutory definition of the offense. Whart. Crim. Law, sec. 1453b.

There was no error in the refusal of the court to give the several instructions, 1, 2, 3 and 4, prayed on behalf of defendant.

The only instructions given by the court to the jury were the two following, the first on behalf of the people, and the second on behalf of the defendant, to wit:

"If the jury believe, from the evidence, that if the defendant signed the name of Lawsha Brothers, in San Juan county, Colorado, to the note for \$460, in evidence, with the intention of obtaining money thereon, and did obtain money thereon, you will find the defendant guilty as charged in the indictment."

"The jury are further instructed that, before they can convict the defendant, they must be satisfied beyond a reasonable doubt that he is guilty of the crime charged against him in the indictment; that such doubt must be reasonable and not captious, and that if the jury have

any such reasonable doubt they must acquit the defendant."

The first of these instructions is not merely defective; it is palpably erroneous. It assumes to define the offense; to declare what facts establish the defendant's guilt; and in this it does not state the law of the case. It is scarcely necessary to remark that the facts thus stated, if true, would not necessarily constitute an offense under the statute, for one person may be authorized to sign the name of another. The statute makes the offense to consist in the forging or counterfeiting the handwriting of another with the intent to damage or defraud some person. Under the two instructions given, the jury were in effect directed to return a verdict of guilty, if they believed, beyond a reasonable doubt, that the defendant signed the name of another to a promissory note, intending to procure money, and procuring the same thereby, without instructing them that they must also believe that such signing was forged or counterfeited, and with intent to damage or defraud some person. The mere intent to obtain money on the note was immaterial; it was the unauthorized signing with intent to damage or defraud another, which made the act a crime under the definition of the statute.

It cannot be said that the plaintiff in error was not prejudiced by such a plain misdirection to the jury, and with no other instruction to modify or cure it. For this error the judgment must be reversed and the cause remanded.

Reversed.

GREEN, ADMINISTRATRIX, V. TANEY.

7	278
7	442
10	241
10	271
7	278
15	297
15	451
15	454
16	142
7	278
18	263
1a	91
1a	110
1a	115
7	278
20	119
7	278
21	380
21	489
7	278
25	134
7	278
16a	839
7	278
34	87

1. Misjoinder of causes of action is ground for demurrer, and unless so taken advantage of cannot be made available in this court; and even if raised by demurrer, the objection is waived by answering over.
2. Parties have the undoubted right to submit, by agreement, any issues of fact, equitable or legal, to a jury for determination, and having done so, they will not afterwards be heard to complain.
3. The weight of evidence does not wholly consist in its volume nor in the number of individuals sworn.
4. This court will only interfere with the finding of a jury on the evidence, when, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellant.

Mr. L. C. ROCKWELL, for appellee.

HELM, J. Three questions are presented by the record, and argued by counsel. Named in inverse order, they are: *First*. That the cross-complaint of Taney, who was defendant below, contained causes of action which could not be joined. *Second*. That two issues, one legal, and the other equitable, were submitted to the jury; and that so trying an equitable question was error. *Third*. That the verdict of the jury was contrary to the weight of evidence.

It is questionable if there is anything in appellant's first objection; but we will not pass upon the subject, for the reason that she is in no position to be heard thereon. The objection made, if well taken, would constitute a ground of demurrer, to be specifically stated. A demurrer was filed to the cross-complaint, but no such ground

was averred therein. Had appellant's intestate, Michael Green, who was plaintiff below, therefore, stood by his demurrer, this objection would not now be available. But it is sufficient to say, that had the demurrer properly presented the subject, the right to be heard thereon was waived by afterwards pleading over.

Appellant is in no better position as to her second objection above stated. We are not called upon to say whether either of the issues presented to the jury was equitable, nor whether, if the finding upon either lays the foundation for an equitable judgment, the questions of fact connected therewith were not such as, under our practice, might by the court be submitted to a jury.

The record contains the following declaration: "And thereupon, *all parties consenting thereto*, it is ordered by the court that a jury come, to whom shall be submitted the following issues," etc., naming them. So it appears that Green expressly consented to the submission of both questions to the jury. By his so doing, appellant is estopped from now challenging the regularity of the proceeding. Parties have the undoubted right to submit, by agreement, any issue or issues of fact, equitable or legal, to a jury for determination, and having done so, they will not afterwards be heard to complain.

The third and last objection of appellant rests entirely upon the weight to be given the evidence. Bearing directly or indirectly upon the vital question of fact in the case, Green offered the testimony of ten witnesses, including himself; Taney but one, and that one was himself. There at first appears to be some ground, therefore, for the surprise of appellant concerning the verdict. The evidence is voluminous, and we cannot discuss it in detail, but will proceed to state as briefly as we may our reasons for sustaining the action of both court and jury.

Green was an officer in the employ of the D. & R. G. R'y Co.; it was his business to superintend the operating of construction trains, and, to some extent, the track-

laying, where the road was in process of construction. Taney, appellee, was what is termed a boarding boss; he boarded, at times, many of the men at work under Green. The nine witnesses who support Green were, or had been, railroad employees; nearly all of them being wholly or partly under the control of Green.

Taney at one time brought to Denver and deposited in certain banks, to Green's credit, the sum of \$5,500. While there is much testimony concerning numerous other financial transactions between the parties, the vital question tried was the original ownership of this money. Green contends that it was his private funds, which he simply intrusted with Taney for the purpose of depositing in said banks, it being inconvenient for him to visit Denver in person. Taney asserts that it was his, and was deposited by him in payment and discharge of indebtedness, real or pretended, to Green. The jury, notwithstanding the large superiority in number of witnesses for the latter, must have found this issue of fact for the former.

After examining the testimony we feel warranted in entertaining and stating the following conclusions in connection therewith:

First. As between Green and Taney, the jury were justified in believing the latter. While there are a few discrepancies in the testimony of Taney, in the main it is clear, straightforward and positive. But Green's statements on the stand are conflicting and uncertain. It appears that he testified, some months previous to the trial, at a preliminary hearing connected with the injunction, that he only gave Taney from \$2,800 to \$3,100 to deposit for him. On this trial he is certain the amount was \$5,500; he is sure of this because he had it counted by another party, put into an envelope, and the envelope marked on the outside.

Such a discrepancy as this was well calculated to prejudice his entire testimony with a candid jury. Had he

taken the precautions now sworn to, it is incredible that he did not, in January, remember them, and also the exact sum of money handled. Such matters, in connection with so large a sum, are not often forgotten, and the party beneficially interested seldom fails to avail himself of them, on the first and every succeeding opportunity. There could be no reconciling of the testimony of these two witnesses as to this transaction. If Green's statements were disbelieved, his whole case must fall.

Second. Many of the matters sworn to by the nine witnesses, who appeared for Green, were highly improbable. If they were true, Taney acted and talked in a manner utterly unworthy of a sensible or careful business man. In the language of the district judge who tried the case: "In order not to give a verdict for Taney, they, the jury, must not only be prepared to say that he committed wilful and corrupt perjury, but that he acted in a most indiscreet and foolish manner, in talking about the money he had upon his person, at San Antonio and other remote points in the state, midst crowds of persons, who, he might well suppose, would not only not protect him in his possession of the money, but who might be easily tempted to rob him of it."

Third. There were absurdities and inconsistencies in the testimony of these witnesses, which must have attracted the attention of the jury, and some of their statements were *squarely contradicted by extrinsic evidence*, which was doubtless accepted as true.

Fourth. The jury saw these men, noted their language, appearance and demeanor upon the witness stand, and, perhaps, also had a personal acquaintance with some of them. They knew their relations, present and past, with Green, and probable interest in aiding him, or inclination to do so.

The weight of evidence does not wholly consist in its volume, nor in the number of individuals sworn. That is a most beneficent evidential rule, which gives juries a

large discretion in judging of the credibility of witnesses; which makes it peculiarly their province to discriminate between those who testify before them, and imposes upon them the duty of sifting the evidence, accepting the true and rejecting the false.

And this court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties.

We cannot say that this case furnishes such a presumption. We think the jury were justified in the findings before us.

The judgment will be affirmed.

Affirmed.

JAMES V. DUKE.

In this case *held*, that if it be conceded that defendant would be entitled, upon a proper showing, to damages by way of set-off against the plaintiff's demand, he proved no damages, and therefore cannot be heard to complain after judgment.

Appeal from County Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. E. P. HARMAN and J. M. ELLIS, for appellant.

Messrs. WOLCOTT and MILBURN, for appellee.

BECK, C. J. Duke, who was plaintiff below, sued James for the recovery of \$50, being one month's wages as clerk at the Brunswick Hotel, in this city. The action was originally instituted before a justice of the peace, who gave judgment for the plaintiff, from which the defendant appealed to the county court, where the

cause was tried to the court without a jury, and judgment rendered for the full amount of plaintiff's demand.

The defense relied upon is that the plaintiff was employed as a book-keeper for the hotel; that he did not keep the books correctly, and violated the contract made with the defendant at the time of his employment, by leaving the service of defendant without "finishing up his books," whereby defendant was damaged to the amount of \$50.

Upon an inspection of the testimony, the following facts appearing therein are uncontradicted, viz.:

That plaintiff was employed at the hotel by defendant at a stipulated compensation of \$50 per month, the service to commence October, 1, 1881. That plaintiff served the entire month, quitting of his own volition on the night of the last day of the month, and that he has received no compensation therefor. No complaints of inefficiency were made by defendant during the employment, but, on the contrary, he stated to one of the witnesses, about the middle of the month, that plaintiff was the best clerk he ever had.

Upon the question as to the capacity in which plaintiff was hired, the testimony is in irreconcilable conflict.

The plaintiff swears that he made no pretensions of being a book-keeper, and did not hire as such, but as a hotel clerk, although he did keep the books in addition to performing the duties of clerk during his engagement. The defendant, on the other hand, is equally positive, in his testimony, that he hired the plaintiff as a book-keeper, and in consideration of his alleged experience in keeping books. Both parties produced some evidence in corroboration of their respective statements.

We cannot say, upon the testimony before us, that plaintiff was hired as a book-keeper for the hotel, and that he was not hired, as he claims, merely as a hotel clerk. There is a wide difference between these avoca-

tions, as was stated by the witness Gage. If plaintiff was hired as a hotel clerk only, the defense clearly fails.

But there is another consideration which is decisive of the case. Defendant has proved no actual damages resulting to him from the plaintiff's inefficiency as a book-keeper.

The only testimony on this point is that of defendant, and the witness Cramer. Defendant says he had to employ Cramer, a book-keeper, to straighten up the books after plaintiff left him. Cramer says he found the books only partially posted, two days' business not being transferred to the books at all. He then produced the books, and showed by them what errors had been committed therein by the plaintiff, which were as follows:

A mistake had been made in the account of M. Caulde & Co., but the amount of the error is not stated. On three pages the footings were incorrect; on four pages the balances were incorrect.

There is no testimony that defendant suffered any loss on account of these errors, and the only testimony to found the claim of \$50 damages upon, is Cramer's direct testimony that it was worth \$50 to straighten up the books. He did not swear that he received that or any other sum for this service. His further testimony is, that he is the book-keeper of the hotel, having entered the employment of the defendant on November 1st, being the next day after plaintiff left; that he has been there constantly ever since, and that it did not take him long to remedy the defects in the books. There is nothing to show that this work interfered with the full performance of the duties of his employment, or that any extra compensation was paid, or contracted to be paid, on account of this special work. For aught that appears, it was considered as attaching to his legitimate duties under the general engagement.

It is, therefore, unnecessary to discuss any of the legal questions which have been raised. If it be conceded

that defendant would be entitled, upon a proper showing, to set off damages sustained against the plaintiff's demand, he has proved no damages. The judgment will therefore be affirmed.

Affirmed.

SIMMONS V. THE CALIFORNIA POWDER WORKS.

1. The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred.
2. Under this rule, *held* that, by the fourteenth subdivision of section 1 of the attachment act of 1881, the legislature intended to define a separate and additional ground of attachment.

7	285
7	296
7	438
11	387
7	285
13	62
7	285
19	433
7	285
17a	394

Appeal from County Court of Arapahoe County.

THE case is stated in the opinion.

Messrs. MARKHAM, PATTERSON and THOMAS, for appellant.

Messrs. BULLICK, BAXTER and DICKSON, for appellee.

STONE, J. The sole question presented by the record in this case is, whether the fourteenth subdivision of § 1 of the attachment act of 1881 constitutes a separate and specific ground of attachment; one in addition to those enumerated in § 92 of the Civil Code, of which the act of 1881 is amendatory.

The first paragraph of the section is as follows:

“No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of a district court, or in the office of the clerk of a county court, in the state, or with the judge of said county court, where no clerk is provided, in cases where said courts have jurisdiction given to them by law, an affidavit setting forth

that any person is indebted to such creditor, stating the nature and amount of such indebtedness, as near as may be, and alleging any one or more of the following causes for attachment," to wit:

Then follows an enumeration of such specific causes, beginning:

"*First.* That the defendant is not a resident," etc.

Twelve causes are thus set forth as separate grounds of attachment, and then follows this paragraph:

"*Thirteenth.* In every case where any affidavit shall be made and filed, as aforesaid, it shall be lawful for such clerk to issue a writ of attachment, directed to the sheriff of the county, or to any other county, as hereinafter provided, returnable like other writs or process in this act, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs of suit, in whose hands or possession the same may be found."

The amendatory act of 1881 re-enacts the whole of said § 92 of the code, *verbatim*, and adds the following, after the foregoing paragraph:

"*Fourteenth.* In all actions brought upon overdue promissory notes, bills of exchange, other written instruments, for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue, upon complying with the provisions of this section."

The meaning of this added subdivision of the section is the question in controversy.

Three possible constructions are suggested in the arguments of counsel in this and the other cases involving the same question.

First. That the language used provides no specific or added ground of attachment, but means simply that in the cases arising upon the classes of overdue indebtedness

specified, attachment will lie, provided they are coupled with any of the preceding enumerated grounds of attachment that may exist in the given case. But this construction would render the paragraph wholly useless, for the reason that under the preceding section of the act, of which this is amendatory (section 91 of the code), in case any of the twelve enumerated causes existed, attachment would lie upon any of these specified matters of overdue indebtedness, without the amendatory provision in question, and this latter would add nothing whatever to the law as it existed before the amendment. Since we must consider the legislature intended some change in the existing law, by enacting the amendment, we are, therefore, forced to reject this construction, which would render the amendatory act, so far as it relates to the whole of said § 92, utterly useless.

The second construction contended for is that the amendment in question was intended to restrict the operation of the provisions of § 94 of the code, and to cut off the writ in all cases where the debt is not due.

Section 94 is as follows: "Actions may be commenced, and writs of attachment issued, as prescribed in this chapter, upon debts or liabilities not yet due, if the affidavit states any of the cases mentioned in the preceding section (section 92), except the first, second and third subdivisions of said section, provided that any judgment obtained under the provisions of this section shall be with a rebatement of the interest, from the time such judgment is rendered until the time at which said debt or liability would have become due."

This construction is not only a strained one, but is inconsistent with the amendatory act itself, inasmuch as the latter neither expressly nor impliedly repeals or modifies § 94. It in no way refers to said section, but, on the contrary, expressly declares the enactment to be an amendment to § 92, and hence, its effect cannot be extended by construction beyond its declared object and

purport, unless by a necessary implication, which certainly does not arise out of either the language itself, or the declared purpose, but is repugnant thereto.

The third and last meaning contended for, unless we say it means nothing at all, is that it was intended to create, and does so create, a specific and new cause of attachment, in addition to those before provided, and existing in § 92 of the code.

The principal difficulty in giving the language employed this construction,—a difficulty, I think, more apparent than real,—consists in the awkwardness of the phraseology and mode of expression in framing the provision. It will be observed that the paragraph numbered "*thirteenth*," of § 92, contains no cause for attachment, but sets forth the mode of procedure after the filing of the affidavit provided for in the first paragraph of the section, and the numbering of this latter paragraph of the section is simply a blunder or oversight in preparing, copying or printing the act. The same oversight is perpetuated in the amended act of 1881, and the framers of the latter act, being evidently misled by the former, numbered the added subdivision "*fourteenth*," instead of placing it immediately after the *twelfth* enumerated subdivision, and numbering it *thirteenth*, and omitting the numbering of the closing paragraph of the section. Had this been done, the meaning would have been more evident. In addition to such correct placing and numbering, had the wording followed the phraseology of the other twelve stated causes of attachment, for example, "that the indebtedness of the defendant is upon an overdue promissory note, bill of exchange, other written instrument, for the direct payment of money, or upon book account," there could have been no question as to the meaning.

It is argued, however, that the closing words of the paragraph, "the creditor may have a writ of attachment issue upon complying with the provisions of this sec-

tion," render the whole subdivision obscure and meaningless, unless they may be construed to imply that in actions brought upon instruments and accounts, of the character specified in the first clause of the sentence, attachment will lie, provided there is a compliance with the provisions of the section requiring affidavit of the existence of some one of the twelve causes enumerated. This construction we have already discussed and disposed of as untenable, because adding nothing to the previously existing law. We think this latter part of the paragraph under consideration can be reasonably construed to imply no more than a compliance, on the part of the creditor, with the requirement of the section touching the filing of the affidavit, and setting out therein all that is prescribed in the first paragraph of the section preceding the enumerated grounds of attachment, as a foundation for the writ.

But even in this view, we must consider that the words, "the creditor may have a writ of attachment issue upon complying with the provisions of this section," are altogether superfluous, such condition being already fully covered by preceding provisions of the act. If, then, we reject these latter words of the provision as superfluous, we have left a provision which contains a meaning, and which can have but one rational meaning, considering its position and numbering in the supposed proper order of the enumerated causes of attachment, as well as considering the character of the provision itself, thus eliminated from the useless condition appended. The evident meaning, in this view, is that this numbered subdivision was intended to define a separate and additional cause of attachment, to wit, an indebtedness existing upon the overdue instruments and accounts specified. No other construction would give the act any effect whatever, other than already conferred by pre-existing statutes. The settled canons of judicial construction require that possible interpretation to be given a statute which will

render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred.

The argument against the harshness of the law, entailed by such a cause of attachment, is without force when directed to the judicial instead of the legislative department. We have no disposition to question the necessity, utility or propriety of the provision, as a ground of attachment, even were it within our province so to do. If it be said that it entails hardship upon the debtor, it may be replied that to the legislative mind, in enacting this amendment to the former statutes, it may have appeared that the absence of such a law had entailed greater hardship to the creditor. That such a law is not without precedent, the statutes of many states, for many years, sufficiently attest.

Stripped of unnecessary verbiage, and disregarding inaptness in phraseology, and oversight in the numbering and position, as not fatal to the evident intent and reasonably inferable meaning, we must hold the provision in question to intend and constitute a distinct, specific and valid ground of attachment, additional to the twelve others enumerated in the act.

There being no error in the ruling and judgment of the court below, the judgment will be affirmed.

Affirmed.

PROCEEDINGS
IN THE
SUPREME COURT OF COLORADO
UPON THE DEATH OF
HON. GEORGE G. WHITE.

Upon the opening of court on the 1st day of April, A. D. 1884, the following remarks were made by Hon. ROBERT S. MORRISON:

If the court please: I have been appointed by the bar of Lake to present the following resolutions on the death of Hon. GEORGE G. WHITE, late a lawyer conversant with contentions in this court:

“RESOLUTIONS OF RESPECT.

“WHEREAS, The members of the bar of Lake county have learned of the sudden death of the Hon. GEORGE G. WHITE, our much esteemed brother, and for many years an able and honored practitioner at this bar.

“Resolved, That while the memory of Mr. WHITE deserves to be cherished by us as a friend, and by the public as a valuable and upright citizen, the bar desires especially to remember him to-day as an accomplished and honored lawyer, whose labors have been most honorable to himself and his family and most valuable to the profession.

“Resolved, That we extend to the family of the deceased the expression of our earnest and sincere condolence in their bereavement.

“Resolved, That a copy of these resolutions be transmitted to the family of the deceased, and be also presented to the several courts of record of Lake county, and to the supreme court of the state of Colorado, and to the circuit court of the United States for the district of Colorado, with the request that they be spread upon the records thereof.

“A. S. WESTON, Chairman,

“J. B. BISSELL,

“CHAS. S. THOMAS,

“M. S. TAYLOR,

“A. DANFORD,

“A. W. RUCKER,

“CLINTON REED,

} Committee.”

In presenting these resolutions, I have to say that in every man of mark and character is developed some one faculty which enables him to prove his genius and assert dominion over the mass of his fellows.

In the case of the distinguished person named in these resolutions, that one faculty was the power of touching the heart by an appeal to the human sympathies, in reaching the passions which are stronger than the intellectual faculties, and assert the subjection of the mind to the soul.

Like every other nascent commonwealth, this state has produced a greater proportion of strong men than come to the surface in older communities; each has a different stone to lay in building the common fabric; each furnishes his native or acquired talent in raising the arch; but to one alone, or at least to one typical class, is reserved the setting of the key, and, to my mind, this honor belongs to the magnetic orator, a good man reaching out with heart and voice to the instincts of other good men, rather than to him who worships that divinity known by the name of human reason.

This, then, was the power which GEORGE G. WHITE had in a prominent degree, as all who knew him acknowledged, and which placed him among the leaders of the bar and people of this state, both as lawyer and legislator. But there comes a power which,

"When we have wandered all our ways,
Shuts up the volume of our days,"

and to the power of the destroyer, the leveler, common enemy, the common friend, that just and mighty thing called death, that eloquent persuader to equality, this man and friend has yielded, and has gone to add one to the army of the silent host, which, without arms or commander, is gathering for the last review.

With these words for a man who was my friend and partner, I ask that these resolutions be spread upon the records of this court.

The following response on behalf of the court was made by Mr. Justice STONE:

On behalf of the justices of this court, it is fitting, and but just to the memory of the deceased, to say that we share in the feelings and sentiments expressed in the resolutions presented. Death appears in a doubly unwelcome and cruel aspect when it suddenly strikes down as its victim one in the prime of life and in the full strength of physical health. To say that Mr. WHITE will be missed from his place in the bar of the state, is to say what each member of the profession who knew him will long feel. He was an active worker in the ranks of his profession. Always earnest, zealous and pronounced in his convictions and aims, he held a prominent place at the bar as well as in public life within his sphere of action. Associated with him, as was the present Chief Justice and myself as members of the constitutional convention

of Colorado, this circumstance, as well as the subsequent relations of attorney and judges of this court, imparts more than a usual degree of interest to the feelings we are called upon to express here to-day. We sincerely add our testimony to that of his brethren of the bar in proof of the genuine good character of the deceased, as a lawyer, as a citizen, and as a husband and father. To the bereaved widow and children we tender our sympathy and condolence. And for ourselves, may this sudden and unlooked for death of our brother be received as an emphatic reminder of the uncertainty of life's tenure and the importance of being ever ready for this solemn event in all our relations of citizenship, society and family. Sad as are the feelings which death under all circumstances awakens, yet it is not unmixed with a pleasurable sense of relative satisfaction when the living can testify to the usefulness and honor of the life that has departed.

The resolutions will be spread upon the records of this court as a testimonial to the character and in perpetuation of the memory of
GEORGE G. WHITE.

CASES DETERMINED
IN THE
SUPREME COURT OF THE STATE OF COLORADO.

APRIL TERM, 1884.

KELLERMAN V. THE CRESCENT MILLING & ELEVATOR
COMPANY.

Error to County Court of Arapahoe County.

Messrs. FRANCE and ROGERS, for plaintiff in error.

Messrs. BULLICK, BAXTER and DICKSON, for defendant
in error.

STONE, J. The only question properly raised by the assignments of error in this case is the same as that in the case of *Simmons v. The California Powder Works*, just decided, and hence, the reasons for the opinion of this court in that case are equally applicable to this.

The constitutional question raised by counsel in argument relates to the Civil Code act of 1877, and not to the act of 1881, which is here involved.

The judgment of the court below is affirmed.

Affirmed.

7 206
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SNYDER V. VOORHES, EXECUTRIX, ETC.

In an action to cancel and set aside a deed of record, on the ground that it was never delivered, and its possession procured by the grantee by fraud — the grantee being dead, his heirs are necessary parties. A complaint against the executrix only, *held* bad on demurrer.

Appeal from District Court of Pueblo County.

THE case is stated in the opinion.

Mr. E. J. BENNETT and Mr. G. Q. RICHMOND, for appellant.

Mr. J. W. HORNER and Messrs. PATTON and URMY, for appellee.

STONE, J. The complaint of the appellant, as plaintiff in the court below, alleged that her husband, being indebted to James L. Voorhes, the husband of appellee, the defendant below, gave his promissory note therefor, payable to Flora L. Voorhes, the said defendant; that afterwards, for the purpose of discharging said indebtedness, the plaintiff executed a deed conveying certain land lying in the county of Pueblo, to the said James L. Voorhes, and deposited the said deed as an escrow with one M. G. Bradford, to be delivered to the said grantee upon condition that the note aforesaid should be surrendered and delivered to said depository; that subsequently the said Bradford offered to deliver the deed to the said grantee and his wife, the defendant, upon the condition aforesaid, but that both said grantee and defendant refused to comply with said condition and deliver up the note; that afterwards, in the absence of said Bradford from his house, the said grantee went to said house, and, upon pretense of examining said deed, obtained the same from the wife of Bradford, and, without the knowledge or consent of said Bradford, or of the plaintiff,

carried the deed away and had the same recorded, fraudulently and in violation of the condition of its delivery, etc. That the said note has never been delivered up nor canceled, the said land never been paid for, nor has there ever been any consideration for said deed. That neither the said James L. Voorhes nor his said wife, the defendant, has ever owned nor been in possession of said land, but that the plaintiff is now, and has been, in continuous possession of said land, and the ownership in fee thereof. That subsequent to the recording of the deed as aforesaid, the said James L. Voorhes died, leaving a will, by which the said Flora, the defendant, was appointed the sole executrix thereof; that said will was probated in the county of Onondaga, in the state of New York, and said defendant thereupon qualified as said executrix, and entered upon the duties thereof. That the said deed so fraudulently obtained and recorded as aforesaid is a cloud upon the title of the said lands of the plaintiff, and the complaint therefore prays that the same be adjudged fraudulent and void; that it be set aside, canceled and expunged from the records, and for general relief.

This complaint was demurred to by the defendant, the demurrer was sustained, and the plaintiff appeals to this court, assigning for error the ruling of the court below in sustaining the demurrer and rendering judgment thereon.

The principal question raised by the demurrer, and the only one we need pass upon under the assignment of errors, is whether the proper and necessary parties are made defendants in the action.

On the part of the appellant it is insisted that, since there was no valid delivery of the deed, no interest in the premises passed by the conveyance to the decedent, as grantee, in his life-time, and hence neither his heirs nor devisees have any interest to be affected by the decree prayed for in this action. While it is true that a deed delivered wrongfully and fraudulently, or without au-

thority, and contrary to the conditions of its delivery, as averred in this complaint, like an undelivered deed, passes no estate or interest thereby, yet the averments of the complaint in this case are facts to be established upon trial; and while these averments are, by the demurrer, admitted to be true as against the sole defendant sued, as executrix, yet they are not admitted as against any one not a party to the action. Taking the complaint as true, the deed in question having been properly executed by a competent grantor and upon a sufficient consideration, to a competent grantee, would, upon a good delivery, operate to pass the estate therein described, and the heirs or devisees of the decedent grantee dying seized of the premises would be the real parties in interest to be affected by a judgment or decree in this action. Their possible interest cannot be admitted away by the executrix; such heirs or devisees, in whom the estate would be vested in case the conveyance were valid, are entitled to their day in court, and to have an opportunity to contest the averments of the complaint in the action. In real actions, or one like this, in which the title to realty is affected, it is as important to the parties plaintiff as to parties defendant to have the proper and necessary parties before the court, in order that they may be bound by the judgment. We think there was no error in the ruling and judgment of the court in sustaining the demurrer upon the ground of a defect of proper parties defendant, and the judgment will be accordingly affirmed.

Affirmed.

TUCKER V. PARKS.

The supreme court may reverse, and direct what judgment shall be entered in the court below.

Appeal from District Court of Lake County.

Messrs. R. D. THOMPSON, MARKHAM and PATTERSON,
for appellant.

Mr. D. E. PARKS, for appellee.

UPON petition for rehearing the following opinion was delivered.

Per Curiam: Upon a full consideration of this case and examination of the numerous authorities cited in the briefs filed on the rehearing herein, we agree in concluding that upon authority this court has ample power to reverse and direct a judgment in the present case, and that the ends of justice will be subserved thereby.

It is therefore ordered that the court below be directed to enter a judgment in accordance with the opinion heretofore rendered in this court therein, for the sum of \$7,946.20, the same being the amount of the value of the goods in controversy as admitted by the pleadings, together with interest on said amount from January 10, 1880, to the date of said judgment, if the plaintiff shall elect to accept such directed judgment within ten days from the filing of the *remittitur* in the court below; otherwise, the cause will stand for new trial as heretofore remanded.

It is further ordered that the appellee, Parks, be adjudged to pay the costs of the proceedings in this court.

THE RIO GRANDE EXTENSION CO. v. COBY.

1. Time checks are assignable obligations, and need not be accepted.
2. In an action upon such "time checks," it is necessary to offer some proof of the agency of the person by whom they were made, unless there is a waiver of the same. Otherwise nonsuit should be allowed.

Appeal from County Court of El Paso County.

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THE facts are stated in the opinion.

Messrs. WM. HARRISON, L. N. CUTHBERT and L. K. BASS, for appellant.

Mr. J. B. COCHRAN, for appellee.

HELM, J. This action was brought against the Extension Company by appellee, as assignee and owner of five several instruments of writing known as time checks. The checks, and also certain separate orders relating thereto, were received in evidence over the objections of appellant. There is no claim or proof that these orders were ever presented to or accepted by the company; the judgment, therefore, cannot rest upon them, as no liability on its part thereunder was shown. It must be sustained, if at all, exclusively by the time checks. They are alike in form, and the following example is all that need be given here:

Time check. Not negotiable. Payable on regular pay day.

"COLORADO SPRINGS, COLO., July 17, 1880.
 "Paymaster Rio Grande Extension Company:
 Due Thos. Flynn, for labor in month of July, 188, as
 laborer, twelve days, at \$1.25 per day.....\$15 00
 Deduct for board..... 3 05
 Balance due.....\$11 95

"T. S. BLACKBURN, Foreman.

"Approved: F. T. GRISWOLD.

"Indorsements:

"THOS. ^{his}X FLYNN. Witness: E. W. ROSENBERG."
 mark.

These checks purport to be written acknowledgments of indebtedness executed upon a settlement with the laborers to whom they were given. They are apparently made for the information and guidance of the company; and therefore we might perhaps infer that they were intended to represent obligations of the company.

Each acknowledges a definite sum of money to be due

from some one to a payee named therein, and is payable at a time certain; were there no restricting words, they would, therefore, be clearly negotiable under our laws. Chapter 9, General Statutes. The indorsement of the payee's name upon the same is the proper mode of transferring the ownership of such instruments.

But the words "not negotiable" appear written or printed across the end of these checks. It is unnecessary for us to consider whether the maker has power to take away by such declaration the attributes of negotiability bestowed upon the instruments by statute; for, in the first place, they still remain assignable thereunder, and secondly, they are choses in action, and, as such, the ownership might be transferred by assignment independent of statute.

Under our practice (see sec. 3 of the Code of Civil Procedure), the equitable rule relating thereto prevails, and the action should be in the name of the purchaser and assignee, because he is the owner and real party in interest. The principal effect of destroying the negotiability of these instruments is simply to render them subject in suit by the assignee to all defenses existing prior to notice of the assignment that might have been interposed to an action by the original payee. *Pomeroy's Remedies and Remedial Rights*, sec. 157; *Combs v. Chandler*, 33 Ohio St. 178; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Parsons on Contracts*, 227.

Objection is made that no acceptance of the time checks by the company was proven; but if a recovery can be sustained upon them at all, it is because they are acknowledgments of indebtedness made by the company itself; they are more in the nature of due bills than orders or bills of exchange, and no acceptance is necessary; this would be equally true could they be regarded as the drafts of one agent of the company upon another agent. Such drafts are analogous to the case where an individual draws upon himself, and "may be treated

either as accepted bills or as promissory notes." 1 Daniel's Neg. Inst. sec. 424.

The word "approved," near the signature of one Griswold, appears written thereon; it may be that Griswold was an agent of the company, and that his approval was evidence to its paymaster of the justice of the debt and genuineness of the time check; upon this subject we are not enlightened by the record; but this supposition, if true, only recognizes a private arrangement or regulation of the company for its own convenience and protection, and in no way changes the character of the instruments, so far as third parties are concerned.

There is, however, a fatal objection to the recovery had in the court below. The action was originally brought before a justice of the peace, and was tried in the county court on appeal; there are, therefore, no written pleadings; no evidence was offered by the defendant, and hence we are not advised of its defenses except as they may be learned from the objections interposed at the trial and argued upon this appeal. From these sources, it appears that the agency of the drawer of the time checks was not admitted. It devolved upon plaintiff, in making his *prima facie* case, to offer some proof upon this point; he introduced none whatever; he did not even show that the checks were ever presented to the defendant for payment; he simply offered them in evidence, together with the orders above mentioned, and rested; he might, perhaps, be excused, under section 1949, General Statutes, from establishing the genuineness of the signature of the maker; but some slight evidence that Blackburn was an agent of the company, authorized to execute such instruments, was indispensable. Angell and Ames on Corp. sec. 283; *First Nat. Bank v. Hogan*, 47 Mo. 473; *Northern Cent. R'y Co. v. Bastian*, 15 Md. 501; *Partidge v. Badger*, 25 Barb. 171; *Chapman et al. v. Chicago & N. W. R'y Co.* 26 Wis. 303; Abbott's Trial Evidence, p. 40 and notes.

Had the action been commenced in a court of record, the complaint would have averred the liability of defendant in appropriate terms; it might perhaps have been sufficient, even though there were no special allegation of agency; but the absence of such averment would be excused simply because corporations can only act by agents, and in law the act of the agent is that of the principal. The liability of the principal could hardly be established without some proof of the agency.

Whether the proceedings be with or without written pleadings, the facts essential to constitute a cause of action must be given in evidence; provided, of course, that such evidence be not waived by the conduct of the defendant or by averment or admission in his answer.

As already intimated, very slight proof in cases like this, on the part of the plaintiff, would be sufficient to raise a presumption of agency, and cast upon defendant the burden of showing that no such relation existed between it and the party professing to act in its behalf. This rule is based upon the fact that knowledge on the subject is fully possessed by defendant, and perhaps difficult of attainment by plaintiff.

The motion for a nonsuit should have been allowed.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

SALSBURY V. ELLISON.

Error to District Court of Boulder County.

Messrs. HARMON and ELLIS, for plaintiff in error.

Mr. PLATT ROGERS and Mr. R. H. WHITLEY, for defendant in error.

ON petition for rehearing the following opinion was delivered by

HELM, J. We discover no reason for changing our views upon the leading questions considered in the opinion deciding the case.

The following propositions were announced and are still adhered to, viz.:

First. That an assignment by the surviving partner of an insolvent firm for the benefit of preferred creditors is invalid in equity, when the question is properly drawn in issue, and that this was true before the adoption of our recent statute on the subject.

Second. That in actions at law, appropriate equitable defenses may be interposed.

Third. That if the defense be not averred in the answer, yet be fully established by the plaintiff in attempting to make out his case in the first instance, he will be deemed to have waived the absence of averment, and cannot recover if objection be taken by defendant; and

Fourth. That this waiver takes place, under our practice, whether the specific defense proven by the plaintiff be legal or equitable.

But these propositions must, of course, be understood with the qualification that the legal action is between the proper parties; and that the defense, legal or equitable, is one of which the *defendant* is entitled to the benefit.

In their argument supporting this petition for a rehearing, counsel urge with considerable force that the defendant in this case has no interest in the equitable defense above stated, and was not entitled to plead the same; also, that the question of fraud in the assignment could only become important and be adjudicated in an action to which the surviving partner, and the unpreferred creditors as well as the assignee, were parties.

We have decided to grant the prayer of the petition, for

the purpose of more fully considering these questions; the arguments upon the rehearing will be confined thereto.

Rehearing allowed.

BECK, C. J. I concur that a rehearing should be granted.

BROWN V. THE CITY OF DENVER.

1. It was no doubt the intention of the framers of the constitution that cities and towns, organized after its adoption, should be organized under general and not special laws. Section 13, article XIV. But that it was not intended to interfere with the city of Denver, and other cities and towns acting under special charters previously granted by the territorial legislature, is apparent from section 14 of article XIV.
2. While the prevailing spirit of the constitution is opposed to special legislation, it is not, however, prohibitory of all special legislation, but only such as relates to certain specified subjects, and to such other cases where general laws are applicable.
3. Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge.
4. A valid assessment cannot be made under an invalid ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Mr. JAMES H. BROWN, for appellant.

Messrs. STALLCUP, LUTHE and SHAFFORTH and Mr. JAMES A. DAWSON, for appellee.

BECK, C. J. This was a proceeding instituted in the district court of Arapahoe county to enjoin the city of Denver and its clerk from certifying to the county clerk

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18	289
7	305
20	476
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6a	76
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23	307
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33	111
7	305
38	333

and recorder of said county certificates issued by the city engineer to the Denver Sidewalk and Pavement Company, certifying that said company had constructed, in accordance with its contract with said city and with the sidewalk ordinance thereof, a plank sidewalk on Broadway street in said city, immediately in front of and abutting upon the lots of the plaintiff, the said lots being duly described in the complaint.

The complaint prays that a writ of injunction be issued, forever enjoining the city and its clerk from certifying to the certificates to the county clerk and recorder, and that the same be delivered up to be canceled, as a cloud upon the title of the plaintiff's lots, and for such other and further relief as to the court should seem proper.

A demurrer was interposed to the complaint, assigning as ground therefor that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff electing to stand by her complaint, gave judgment that the defendant go hence without day.

The ordinance referred to in the complaint is known as the "sidewalk ordinance," and was passed by the city council of the city of Denver, on or about the 17th of March, A. D. 1881, to make provision for and to require the construction and repairs of sidewalks within the corporate limits of the city. It requires the owners of lots, abutting upon streets laid out, improved and in common use by foot travelers, to construct, at their own expense, sidewalks of the kind described by the ordinance. By its provisions, the publication of the ordinance was to constitute notice to lot owners to construct the required sidewalks within sixty days thereafter, the kind of materials, manner of construction, dimensions, and other matters of description and detail, for the sidewalks required to be constructed in different portions of the city, being specified in the ordinance.

Provision was made for awarding a contract for one

year, by the city, to the lowest responsible bidder, for the construction and repairs of sidewalks, under the ordinance and under the directions of the city council. The grading was to be done by the city, and if the owners of property failed to construct the walks within the prescribed time, the contractor was to proceed and build the same, and upon completion thereof the city engineer was required to inspect the work, and if found to be done in conformity with the ordinance, he was authorized to issue certificates to the contractor, which should state the number of linear feet constructed, the number and description of lots and blocks before which the same was constructed, and the amount due the contractor, under the contract, for the portion fronting upon each lot.

To this sum was to be added fifty cents for each lot of twenty-five feet frontage, as payment for furnishing grades, inspections and other services by the city engineer. These certificates were to be presented to the city clerk, who was required to draw a warrant in favor of the contractor upon the "sidewalk fund" for the amount called for.

The ordinance required the city clerk to retain the certificates for a period of thirty days, to afford the owners of such property an opportunity to repay the amounts due upon the lots so improved; if repayment was not made within that time, he was directed to certify the certificates to the county clerk and recorder of Arapahoe county, who was required to place the respective amounts named in the certificates, together with ten per centum penalty thereon, to defray the cost of collection, upon the tax list of the current year, as a special assessment against each of the lots, to be collected as general city taxes are collected.

The foregoing provisions of the ordinance are warranted by an act of the legislature approved April 6, 1877, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory

thereof, into one act, and to revise and amend the same."

Two principal objections are raised as to the validity of the ordinance, one being that the statute under which it was enacted is in contravention of the state constitution, it being a special law, and therefore void; the other, that the provisions of the ordinance are in contravention of both the state constitution and the constitution of the United States, in not affording the owners of the property to be charged with the expense of the improvements provided for, an opportunity to be heard in respect to the same before such assessments became fixed charges against their property.

In *Palmer v. Way et al.* 6 Col. 106, we considered the question whether, under our constitution, the legislature could authorize the city council, by ordinance, to impose upon the owners of lots fronting upon a public street the burden of constructing sidewalks in front thereof, and making the cost of construction a charge upon the property.

The conclusion arrived at was that assessments of this character could not be sustained by virtue of the power of taxation conferred by the constitution, but might be upheld as a police regulation. The two objections to the ordinance above mentioned were not considered in that case, and we will now proceed to consider and pass upon them.

First. Is the act of April 6, 1877, amending the city charter, in contravention of the state constitution respecting special legislation?

It was, no doubt, the intention of the framers of the constitution that cities and towns organized after its adoption should be organized under general and not special laws. This is evident from the language of section 13, article XIV: "The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall

not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions."

It is well known, however, that at the time of the adoption of the constitution, the city of Denver and other cities and towns were acting under special charters previously granted by the territorial legislature. That it was not intended to interfere with these special charters is made apparent by section 14 of said article XIV, which is as follows: "The general assembly shall also make provision by general law, whereby any city, town or village, incorporated by any special or local law, may elect to become subject to and be governed by the general law relating to such corporations."

This section clearly indicates that, if a special charter is surrendered, in any case, for the purpose of organizing under the general law, to be passed, it must be by the voluntary act of the corporation. The matter is left to their election.

It is true that the prevailing spirit of the constitution is opposed to special legislation. It is not, however, prohibitory of all special legislation, but only to such as relates to certain specified subjects, and to such other cases as general laws are applicable.

Section 25, article V, enumerates the prohibited cases, and concludes as follows: "In all other cases where a general law can be made applicable, no special law shall be enacted."

This section is similar to section 53, article IV, of the Missouri constitution of 1875, which follows the enumeration of cases wherein special laws are prohibited, with the declaration: "In all other cases where a general law can be made applicable, no local or special law shall be enacted." But the latter section goes further, and declares that whether a general law can be made applicable in any case shall be a judicial question.

Prior to this constitutional provision, the courts of Missouri had held the question to be one for the exercise of legislative discretion, the exercise of which would not be interfered with by the courts. Since our constitution does not make the question a judicial one, the Missouri precedents are in point. In the case of *The State ex rel. Henderson v. The County Court of Boone County*, 50 Mo. 317, the court says: "But who is to decide when a general or a special law will answer the best purpose? It strikes me that this rule in reference to general or special laws is laid down as a guide for the legislature, and the legislature is to judge of the necessity of the particular case. The legislature is quite as able to do this as the courts. The legislature must, in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment, the courts have no right to control it. It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the constitution. When the legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional."

The above views appear to us to be both sound and applicable to the phraseology of our constitution. They are affirmed by the subsequent cases of *The State ex rel. Robbins v. The County Court of New Madrid*, 51 Missouri, 83; and *Hall v. Bray*, id. 288.

Similar views upon like constitutional provisions are announced in *The State of Kansas ex rel. Johnson v. Hitchcock*, 1 Kansas, 178; and *Gentile v. The State*, 29 Indiana, 409.

Whether a special city charter can be amended by a general law, applicable to the whole state, so as to meet the necessities of a particular case, may be a close question, or such an amendment may, perhaps, be impossible. Certainly the first body to pass upon that question is the

legislature. If a general law could not, for any reason, be made applicable to the case, then a special law is authorized by the constitution itself, and, with the authorities cited, we are disposed to hold that the decision of the question is for the legislature, and not for the courts. Had the intention been to make it a judicial question, it should have been so expressed in the constitution. Of course, any attempt by the legislature to evade the constitutional inhibitions against special legislation should be promptly thwarted by the courts.

Second. Is that portion of the ordinance, the validity whereof is questioned by this proceeding, in contravention of the constitution of the United States and of the state of Colorado?

The constitutional provisions alleged to be violated are section 1, article XIV, of the amendments to the constitution of the United States, and section 25, article II, of the constitution of this state.

The former provides: "Nor shall any state deprive any person of life, liberty or property without due process of law." The latter: "That no person shall be deprived of life, liberty or property without due process of law."

Similar provisions appear in perhaps all state constitutions, and they have been elaborately discussed and considered by the ablest courts of the country, including the supreme court of the United States. The conclusions reached are uniform upon questions of the nature involved in this case. It is only necessary, therefore, to state the result of the adjudications.

The doctrine of the authorities is, that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may

be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed.

Learned dissertations upon the meaning of the phrase, "due process of law," have been written by judges and law writers, but as applicable to summary proceedings of the character under consideration, its meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings provides for notice to the owner of the property to be affected, and gives him an opportunity to appear at a specified time and place, before a board or tribunal competent to administer proper relief, in order that he may be heard concerning the correctness of the charge before it is made conclusive, the constitutional requirements are satisfied.

✓ But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, as a matter of favor, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions. This is the doctrine of the following cases, and many others might be cited to the same effect, but reference to them will be found in the cases cited: *Stewart v. Palmer*, 74 N. Y. 183; *Thomas v. Gain*, 35 Mich. 155; *Davidson v. New Orleans*, 96 U. S. 97; *County of San Mateo v. Southern Pacific Railroad Company*, 8 Sawyer, 238.

Testing this "sidewalk ordinance" by the foregoing principles, it is found to be defective, both as to matters of notice and hearing. The only notice given to the owner of property is a notice to construct a sidewalk of a certain kind and dimensions in front of his property, within a specified time, or that the city will cause it to be constructed at his expense; and that if the cost of construction is not repaid within another specified time, the amount, with a certain penalty added, will be placed on the tax roll as a special assessment against his property, and collected in the same manner as general city taxes are collected.

The notice given to build the sidewalk, or that the city will cause it to be built at the owner's expense, is not the equivalent of the notice referred to in the authorities and contemplated by the constitution. It furnishes no information of the amount of the assessment that will be made, nor does it designate a time, place or tribunal, at and before which a hearing may be had. No such opportunity is afforded at any stage of the proceedings, but the expense of constructing the sidewalk is made an absolute charge against his property, upon which it may be sold to satisfy the same.

Until the walk is built, and a certificate therefor issued to the contractor, the owner cannot know what grounds of complaint he may have. The cost of grading may be included; the lumber or the materials may not be of the quality and kind required, or the walk may not be made in conformity with the requirements of the ordinance. In this respect, the ordinance is clearly defective. In so far, therefore, as the ordinance provides for making the cost of construction a special assessment against the property improved, and for the manner of collecting the same without notice or hearing, we are of the opinion that it is in conflict with the state and federal constitutions, and for this reason invalid.

The demurrer to the complaint should have been overruled.

The judgment must be reversed and the cause remanded.

HELM, J. I concur with the majority of the court in the reasoning and conclusion upon the latter branch of the case, and therefore in the reversal thereof. Upon the subject of local or special legislation, I am not at present prepared to accept all the views expressed in the opinion.

Reversed.

EXCHANGE BANK V. FORD ET AL.

1. Obligation, as employed in section 1834 of the General Statutes, and section 14 of the code (section 13, Code of 1883), does not embrace or apply to oral contracts.
2. The code abolishes forms of action merely, and provides a single method of pleading. It does not undertake to do away with the distinction between legal and equitable causes of action. It is still the general rule that equitable relief cannot be secured unless an equitable cause of action or defense appear in the pleadings.
3. Except in certain specified cases, the court has no power to vacate a judgment after the term at which it was rendered.
4. The equitable doctrine that partnership debts are joint and several, does not obtain in a purely legal action.

Error to District Court of Arapahoe County.

THE facts are stated in the opinion.

MR. WILLARD TELLER, Mr. C. J. HUGHES and MESSRS. MORRISON and FILLIUS, for plaintiff in error.

MR. M. B. CARPENTER, for defendant in error.

HELM, J. This action was brought to collect a partnership debt. At common law partners are held to be jointly liable for the firm debts. While each is bound for

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18	444
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19	53
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3a	115
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23	299
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25	236
25	238
25	239
7	314
c20a	513
7	314
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the whole indebtedness, and while a judgment might be recovered, under some circumstances, in an action at law against one of the partners, yet the liability is regarded as joint only, and not as joint and several.

At common law, therefore, the doctrine of merger, contended for by defendant in error, who was defendant below, would undoubtedly govern this case; and he could plead the judgment rendered against his co-defendants in bar of the proceedings against him for the same demand.

A desire to avoid the hardship resulting from the application of this common law rule to the case at bar, coupled with the general importance of the subject, has led us to give the questions presented more than the usual degree of care and consideration.

The suit was first brought against Ford and others upon a promissory note; Ford's co-defendants defaulted, and judgment was rendered against them; afterwards, and before the trial against Ford, plaintiff voluntarily amended its complaint so as to abandon the note, and rest the action entirely upon the original indebtedness represented thereby. The action was, therefore, tried against Ford upon an unwritten contract. At the trial the former judgment against his co-defendants was regarded by the court as a merger of the entire cause of action, and upon this ground plaintiff's right to recover against Ford was denied.

A number of objections to the position taken by the court below are presented by plaintiff in error, and are thoroughly argued by counsel for both parties. As at present advised, we are inclined to believe that, under our practice, the doctrine of merger might be held inapplicable to the case, provided the contract is one of those which are by statute declared to be several as well as joint.

Bearing directly upon this subject we have two provisions, viz.: Section 1834 of the General Statutes, which reads as follows: "All joint obligations and covenants

shall hereafter be taken and held to be joint and several obligations and covenants;" and section 14 of our Code of Procedure, to wit: "All persons jointly or severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

The principal question for consideration, as we view the case, is, do these statutes, or does either of them, refer to and include joint *oral* contracts; or was it the intention to confine their operation in this respect to joint specialties, and joint simple contracts which are evidenced by writing?

Of course no argument is necessary to show that the words "covenants" and "instruments" do not cover unwritten contracts; our inquiry is, therefore, narrowed to a discovery of the true import of the word "obligation," as used in these statutes.

This word has two well-defined legal meanings: one is, where it is a name given to the contract itself; the other includes those cases where it refers to the *duty* imposed upon a person in connection with his contract to perform it, or to a liability arising from his contract or from his actionable tortious conduct.

The first class formerly covered only sealed instruments wherein the obligor was bound under a penalty to do a certain thing; but more recently it has been frequently extended to all written contracts.

Under the second class, Chief Justice Marshall, in *Sturgis v. Crowninshield*, 4 Wheaton, 193, thus defines one meaning of the word: "A contract is an agreement wherein a party undertakes to do or not to do a particular thing; the law binds him to perform his engagement, and this is the *obligation* of the contract."

In illustration of another meaning of the word under this class, we quote the language of Mr. Justice Smith in

Crandall v. Bryan, 15 Howard's Pr. R. 56. Speaking of a certain statute, and referring to the word obligation, used therein, he says that it includes all cases "where the action would not rest upon the *contract*, but would rest upon the legal duty; where the law rests a liability upon a man guilty of fraud, for which an action will lie; whenever fraud and damage give a right of action, the law casts a liability and creates an *obligation*."

The word is used in statutes, as well as in text books and decisions, with these different meanings; and the significance to be given it in each statute must be gathered from the purpose and context of the enactment. The third, and perhaps most uncommon legal use of the word, is found in a New York law; it reads: "When the defendant has been guilty of *fraud* in contracting the debt or *incurring the obligation* for which the action is brought," etc. 15 Howard, 56, *supra*.

We are hardly prepared to quarrel with the court's interpretation, above given, of this statute. It seems reasonably certain that the legislature mean, when they speak of the obligation being "incurred," a liability affixed by law to the fraudulent conduct mentioned. *Contracts* are either expressly made by the parties, or created by implication of law. It can hardly be said that they are ever *incurred*; the *liability* is incurred when the contract is violated, or the fraud committed; and when the word "obligation" is used with reference to this liability, the obligation may also be said to be *incurred*.

In *Hargrove et al., Adm'rs, v. Cooke*, 15 Ga., Lumpkin, J., says: "In Comyns' Digest, obligation is defined to be a deed, whereby a man binds himself under a penalty to do a certain thing. But in its more popular sense, the term obligation signifies the instrument of writing by which the contract is witnessed."

So, also, in Illinois, the expression "obligations and covenants," in a statute exactly similar to our said section

1834, was construed to include a promissory note, and the guarantors thereon. *Gage v. Nat. Bank*, 79 Ill. 62.

It has, however, recently been held doubtful if this Illinois statute has any application to partnership contracts. *Coates v. Preston et al.* 105 Ill. 473.

But no case has been cited, and we have not succeeded in finding one, which holds that this word, when used in a statute with reference to the contract itself, and not the duty or liability arising thereon, includes oral agreements. *Brainard v. Jones et al.* 11 Howard's Pr. R. 569, seems to hold this way, and has been mentioned by counsel as doing so, but the action there was upon a replevin bond, and it was unnecessary to determine this question; besides, in *Strong v. Wheaton*, 38 Barb. 616, this case is discussed, and no such interpretation of the word deduced therefrom.

As the result of our investigation, we feel justified in stating the conclusion that whenever the word obligation is used in a statute as the name of a contract — as it is in the sections now under consideration, — an agreement in writing, sealed or unsealed, is referred to; where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or, in some instances, from actionable tortious conduct.

Counsel for defendant in error, in discussing section 14 of the code, calls our attention to the fact that throughout that instrument, whenever a general indebtedness or liability is mentioned, other expressions are used, as "contract or transaction," "alleged liability," "jointly indebted," "transaction," "contract, sealed or parol," "contract, express or implied," "debts or liabilities," etc. (see sections 19, 21, 43, 58, 71, 91, 94, etc., etc.). This would seem to indicate that the legislature had in mind the meaning of the word *obligation* we contend for, and confined it thereto in section 14.

We are not, however, entirely without direct authority

in support of our conclusion that the word does not include oral contracts. The New York statute is similar to our said section 14 in this respect; the supreme court of that state, in construing the same, use the following language: "The word obligation must be confined to its legal meaning, and it does not embrace a cause of action not evidenced by writing." *Strong v. Wheaton, supra*. See, also, *Barker v. Cassidy*, 16 Barb. 184.

Mr. Pomeroy considers at length the statutory provision existing in many of the states that: "Persons severally liable upon the same *obligation or instrument*, including parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action at the option of the plaintiff." He says with reference thereto: "In the third place, there is no limit to the kind of contract from which this several liability may arise, *provided it is writing*. The broad language of the clause includes any and every species of *written* contract." Pomeroy's Remedies and Remedial Rights, sec. 404.

This is, of course, not binding authority; it is the view, however, of one of our ablest legal writers.

It is argued that giving this restricted meaning to the word "obligation," in said section 14 of the code, renders the word "instrument" entirely superfluous; that "instrument" includes all written contracts, sealed as well as simple; and that unless we assent to the proposition that "obligation" includes oral contracts, we violate the rule requiring effect to be given, if possible, to all the language used. But the use of the word "obligation," under the common law, was originally confined to sealed instruments of a certain kind; and courts have not always given it the significance we have adopted.

The supreme court of South Carolina held that the statutory phrase, "bonds or other obligations," did not include promissory notes; and that it might be construed as though it read "bonds or other contracts under seal." *Executors of Rippon v. Executors of Townsend*, 1 Bay, 445.

In *Gale v. Myers*, 4 Houston, 546, the supreme court of Delaware decline to consider promissory notes as included in the statutory expression, "An obligation or written contract." There are doubtless other cases like these, and in them we discover a reason for the legislature's using both of these words, and also expressly declaring that "bills of exchange and promissory notes" are included thereby. Owing to the doubts surrounding the subject, and inspired by an abundance of caution, the legislature saw fit to insert both words, and also to add the explanatory phrase. In so doing, we think, as was said by the supreme court of Georgia concerning a similar expression, "they were guilty of no vain repetition." *Hargrove v. Cooke, supra*.

But the doctrine that in equity, without statutory provision, partnership debts are both joint and several, is claimed by defendant in error to cover this case.

This is purely a legal action; it is in the nature of *assumpsit*; no cause of action in equity is stated, and no equitable relief is demanded by either party. The code abolishes *forms* of actions merely, including the difference in this respect between actions at law and suits in equity, and provides a single method of pleading; it does not undertake to do away with the distinction between legal and equitable *causes* of action; it does not rescind the rule that the allegation and the proof must correspond, nor the correlative principle, that the judgment must follow the pleadings. To procure standing in a court of equity and obtain equitable relief, the pleader must still state an equitable cause of action or defense. He cannot now, any more than he could before the code was adopted, obtain the benefit in a court of law of principles like the one here invoked, which theretofore applied exclusively to chancery proceedings.

These remarks do not cover instances where some equitable principle has been, by express statutory language or by clear implication, incorporated into procedure at law. Nor do we assert that no case can ever arise

wherein a party may have the benefit of a defense not presented by the pleadings, or waive objection to a variance between the pleadings and the proof and judgment.

We are of the opinion that the foregoing equity doctrine does not apply to this case.

The last position taken by counsel for plaintiff in error which we shall consider is that the court erred at the trial in refusing to set aside the judgment previously taken against Ford's co-defendants.

The judgment which plaintiff moved to vacate was rendered over two years prior to this trial; a number of terms of the court had passed since the one at which it was entered; it was in plaintiff's favor, and was given upon its application. The motion to vacate came from plaintiff, and was not based upon any want or defect of jurisdiction, save as hereinafter mentioned; no fraud or collusion, and no irregular or improper conduct on the part of the defendants in procuring the judgment to be entered, was charged.

Defendant Ford pleaded this judgment in bar in his answer to the amended complaint; to this answer no reply, demurrer or motion was filed. The application to vacate was not interposed until the trial was in progress, and until plaintiff had rested and defendant had offered the judgment in evidence on his defense.

The motion to vacate seems to rest mainly upon the ground that the judgment was rendered after jurisdiction had been divested by the filing of the petition and bond for removal to the federal court, and was, therefore, void. The record itself does not bear out plaintiff's assertion in this respect; it appears that the judgment was given, and the petition and bond were filed, on the same day; but the record entry of the former precedes that of the latter, and we infer therefrom that this was the order in which the acts took place.

It cannot be said that the judgment in question is void, even if we admit the correctness of counsel's position

that, under the view we adopt as to the word obligation, judgment on unwritten joint contracts against one joint defendant, without a determination of the cause as to the others, is irregular and void. At the time this judgment was pronounced, the action was upon a promissory note; the liability upon this instrument was clearly rendered several by section 1834, *ante*; under section 146 of the code, we are of opinion that, as the case then stood, judgment might properly be taken against one defendant, and the cause continue as to another.

The abandonment of the promissory note and subsequent procedure upon the original indebtedness was, as already remarked, plaintiff's own voluntary act.

Plaintiff should have interposed its application for relief from the former judgment prior to the trial against Ford. But it is doubtful if this application would have availed anything, had it then been made, upon any ground that could truthfully have been stated. Courts have very limited discretionary power, except for a few well known causes, to vacate or amend their judgments at a term subsequent to the rendition thereof. No authorities need be cited to the proposition that, in the absence of statute, judgments regularly entered are beyond the court's control after the term has expired. A judgment procured by fraud or by irregular or improper conduct of the successful party, or one entered without jurisdiction of the person against whom it is given, can hardly be said to be *regularly* entered. These, therefore, constitute grounds on which, upon proper showing, courts *sometimes* presume to act at a subsequent term.

Section 75 of the code provides for relief from a judgment taken *against* a party through "mistake, inadvertence, surprise or excusable neglect." But this relief is only granted upon terms, and the showing therefor must be made in the manner pointed out by statute; if in vacation, it must be within five months after adjournment, and satisfactory reason must be given for not applying during the term.

Plaintiff in error, as clearly appears from what we have said, was not in a position to secure the advantage of any of the foregoing reasons or grounds in support of its motion.

We do not think the court erred in overruling the same. The judgment must be affirmed.

Affirmed.

BRANDENBURG V. REITHMAN.

1. In an action of forcible entry and detainer, under the statutes of this state, an appeal does not lie from a judgment of a county court to this court.
2. It is doubtful whether the correctness of the ruling of a county court, in denying an appeal to this court in such a case, can be presented on a writ of error to the original judgment.
3. Where a tenant occupied premises for several years, and then entered into a lease for one year certain, *held*, under the facts in this case, that his former occupancy did not inure to his benefit and constitute him a tenant from year to year, upon his holding over after the expiration of his lease, and so entitle him to three months' notice to quit, under the statute.

Error to County Court of Arapahoe County.

THE case is stated in the opinion.

Messrs. WALDHEIMER and JENKINS and Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. J. H. BROWN, for defendant in error.

BECK, C. J. This was an action, under the forcible entry and detainer statute, to recover possession of leased premises. It was originally instituted before a justice of the peace, the complaint alleging the letting of the premises for one year to the plaintiff in error, from May 1, 1880, and the holding over by the latter, after the expiration of the term, and demand made for possession.

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The plaintiff obtained judgment before the justice, and likewise in the county court upon appeal from the judgment of the justice. An appeal from the latter judgment to this court was prayed by the plaintiff in error, and denied by the court below, which ruling is assigned as the first ground of error.

We are of opinion that the ruling was correct, for the reason that no appeal lay to this court from the judgment of the county court. Section 17 of the forcible entry and detainer statute provides that "appeals and writs of error to the supreme court from the judgments of the district court, and writs of error to the judgment of any county court, in proceedings under this chapter, shall be allowed as in other cases." General Statutes, p. 505.

The same practice existed, in this class of actions, under the territorial organization. An appeal from the judgment of a district court lay to the supreme court, and a writ of error, only, lay to the judgment of a probate (now county) court. R. S. 1868, p. 336, sec. 17.

It is true that an appeal did not then lie from the judgment of a probate court, in any case; but this fact does not affect the question whether an appeal from the judgment of a county court now lies, under the same statute. By the express language of the statute, only a writ of error lies in such case. Unless, then, the right of appeal is given by the Civil Code, it does not exist. The code provision is: "Appeals to the supreme court from the district and county courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of \$20, or relate to a franchise or freehold." Civil Code, p. 124, sec. 415.

This is the same provision (excluding the words, "and county courts") originally enacted in 1861 (Laws 1861, p. 285, sec. 41). It was copied from the statute of Illinois, and the meaning of the phrase—"or relate to a

freehold,"—had been judicially defined previous to the enactment of 1861.

The supreme court of Illinois had said, in *Rose et al. v. Choteau*, 15 Ill. 167, "To justify an appeal on the ground that the judgment relates to a freehold, the right of a freehold must have been directly the subject of the action—not incidentally or collaterally; and the judgment must be conclusive of the right until it is reversed."

This is equivalent to saying that the title of the freehold must be involved in the litigation.

Under the amended practice act of 1877, of the state of Illinois, instead of the words, "*or relate to a franchise or freehold*," the phraseology is, "*where a franchise or freehold * * * is involved*."

In the several decisions upon the effect of the amended provision, no distinction has been made that we are aware of, between the force of the words, "*relate to a freehold*," and the words, "*where a freehold is involved*." In the absence of an adjudication upon the point, we are of opinion that the amendment does not exclude an appeal in any case embraced in the original provision.

Since the amendment it has been held that a proceeding in forcible entry and detainer does not involve or call in question the title to land, and that an appeal does not lie therefrom; also, that a proceeding to foreclose a mortgage, or a proceeding to establish and enforce a mechanic's lien, does not involve a freehold. *McGuirk v. Burry*, 93 Ill. 118; *Pinneo v. Knox*, 100 id. 471; *Clement v. Reitz*, 103 id. 315.

We deem the cases cited upon this point conclusive as to the force and meaning of the phrase referred to. Sec. 94, Sedgwick & Wait on Trial of Title to Land.

Another point made in favor of the right of appeal is, that sec. 267 of the Civil Code abolishes the distinction between the actions of *ejectment*, and *forcible entry and detainer*; makes the latter a concurrent remedy with the code substitute for ejectment, and makes all rules of prac-

tice, including appeals, equally applicable to the proceeding, whether it be under the code remedy, or the forcible entry and detainer statute.

This proposition is not maintainable. The code provision cited, itself defeats the proposition. Forcible entry and detainer is therein recognized as an existing and concurrent remedy with the code substitute for ejectment, "in all actions relating to the possession of real estate." It is not stated that it may be prosecuted as a code remedy, or that the rules of practice provided by the code shall apply to this proceeding, but that it "may be prosecuted in accordance with the law of this state relating to forcible entry and detainer."

When an action is instituted to try a question of title in a court having jurisdiction to try the question, the mere form of the complaint is immaterial. Its substance is the test of its sufficiency. But if the action be instituted in a court not having such jurisdiction, an appeal from its judgment to one having jurisdiction does not invest the latter court with original jurisdiction to try that question. *Downing v. Florer et al.* 4 Col. 209.

Forcible entry and detainer is a statutory remedy which still exists, notwithstanding the code. Justices of the peace still have jurisdiction of this remedy, although they may not now, any more than heretofore, try the question of title to a freehold. It follows that this statutory remedy has not been enlarged by the code provision referred to, but remains in force for the purposes heretofore employed.

We have considered this assignment of error for the reason that it involves an important question of practice. It is doubtful, however, whether the correctness of the ruling of the court below, in denying an appeal to this court, can be properly presented on a writ of error to the original judgment. It is said in *Eager v. Eager*, 8 Bradwell, 356-362, that where a court improperly refuses to grant an appeal, the proper remedy is *mandamus*

to the court below, requiring the allowance of the appeal.

The only other assignment of error necessary to notice is, that the court erred in rendering judgment for the plaintiff below.

The ground of this assignment is, that plaintiff in error was a tenant from year to year, and was entitled to three months' notice to quit, under the statute.

The evidence shows that plaintiff in error occupied the premises as tenant of defendant in error for several years prior to the execution of the lease produced upon the trial.

This lease bears date May 1, 1880, is signed by both parties, and is for the term of one year, with the following agreement as to another year: "And it is expressly understood and agreed, that in case the said party of the first part does not conclude to build a new building on the said premises at the expiration of this lease, then the said party of the second part is to have the first privilege of leasing said premises for another year after the expiration of this lease."

We cannot subscribe to the proposition that, because the plaintiff in error held over one year after the expiration of the term mentioned in the lease, that his former occupancy of the premises inured to his benefit, and that the facts of the case constitute him a tenant from year to year.

If his former relation was that of tenant from year to year, that relation ended when he entered into this lease as tenant for a single year. At the expiration of the year, the contingency mentioned having happened, the testimony, we think, shows an implied contract on his part to hold the premises for the second year on the same terms.

The fact that he occupied the premises during the second year, and that he claimed to do so under the lease, as is shown by his testimony upon the trial, taken in con-

nection with the stipulation for a second year in the lease itself, fairly implies a contract to this effect.

Prior to the expiration of the second year, he was notified to quit at the end of the year, and, refusing to do so, possession of the premises was duly demanded after the termination of the tenancy, which he refused to surrender. We think the judgment was correct, and it will be affirmed.

Affirmed

CITY OF DENVER V. DUNSMORE.

1. The general current of authorities supports the view that when municipal corporations are invested with the exclusive authority and control over streets and bridges, with power for raising money for their construction, improvement and repair, a duty arises to the public—whether expressly enjoined in the charter or not—from the nature of the powers granted, to keep them in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon such corporations to respond in damages to those injured by a neglect to perform the duty. Such duty is municipal or ministerial, and not governmental or discretionary. *Daniels et al. v. City of Denver*. 2 Col. 689, distinguished.
2. If the plaintiff, in his own case, shows that he brought the injury upon himself, he may be nonsuited. But if the defendant's failure of duty and the injury to the plaintiff are shown, and it does not appear that the plaintiff brought on the injury by his own negligence, such proof must come from the defendant.
3. When the measure of duty is ordinary and reasonable care, the question of negligence is one for the jury to determine. When the plaintiff has made a *prima facie* case, the court will not take it from the jury.
4. Where the amount of damages does not depend on computation, as in case of personal injuries, to warrant the court in setting aside the verdict as excessive, it must appear that the amount of damages given by the jury is so disproportionate to the injury received, as to show that the jury were influenced by prejudice, misapprehension, or some corrupt or improper consideration.
5. The court, in furtherance of justice, may, in its discretion, allow the usual order of introducing testimony to be departed from. When the defense relies upon expert testimony, it is entitled to put it in

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after all the evidence bearing on the question offered by plaintiff. And if the court allows plaintiff to vary the state of facts after the expert testimony has been heard, the expert witnesses may be recalled. If no offer to recall them be made, the case will not be reversed.

Appeal from District Court of Arapahoe County.

THE facts are sufficiently stated in the opinion.

MR. J. L. JEROME and Mr. C. W. WRIGHT, for appellant.

MESSRS. DECKER & YONLEY, for appellee.

BECK, C. J. The principal question raised by the assignment of errors and discussed in the briefs of counsel for both parties, is, whether an implied liability rests upon municipal corporations proper, under the laws of this state, to keep in repair the streets and bridges within their corporate limits; and whether actions lie against them at the suits of individuals for special damages suffered in consequence of their neglect so to do.

It is conceded that the legislature has not expressly given such right of action, either by the general statute or by the special charter under which the city of Denver was incorporated. The right to maintain such actions for damages therefor, if it exists, depends upon principle and precedent.

Judgment was rendered against the city, in the court below, and upon this appeal its counsel says: "In seeking a reversal of this judgment, the reasons urged by appellant may be submitted under two heads:

"1. The corporation of the city of Denver is exempt from all liability to individuals for special damages suffered by reason of failure to repair streets or bridges. The functions of the corporation are purely governmental, and the remedy for malfeasance by public officers is by indictment.

"2. We rely upon the specific exceptions reserved by appellant in the court below."

Counsel on both sides have discussed the questions involved very fully, and have cited and rely upon, as precedents supporting their respective theories, a list of cases extending from an early period in the seventeenth century, up to the present time.

The several propositions of counsel for the city, upon the first ground for reversal, as we understand them, are substantially as follows:

First. That at common law no action for damages lay against a municipality for negligence in the exercise of its public duties or powers.

Second. The almost universal rule of decision is that, in the absence of statute to that effect, no such liability attaches to *quasi* municipal corporations, such as counties and unincorporated towns.

Third. No such liability is created by any statute of this state, as against either municipal corporations proper or *quasi* municipal corporations, while the powers conferred by charter in the one case, and by the general law in the other, respecting the opening and maintenance of highways and the building and repairs of bridges, are practically the same in both cases. No such liability, therefore, exists in either case.

Illustrative of the doctrine contended for, counsel for appellant says, if this accident had occurred upon a highway outside the city limits, the action could not be maintained against Arapahoe county. The substance of the whole argument is, that the courts which have held municipal corporations liable to individuals for special damages have done so in violation of common law principles and precedents, and without assigning any logical reasons why, in absence of an express statute fixing such liability, the same rule of decision should not be applied as in cases of *quasi* corporations, against which it is not pretended that such liability attaches.

Counsel for appellant insists, throughout the entire discussion, that, unless this court can point out a tangible distinction between the powers, privileges and duties of these two classes of corporations under our statutes, the precedent to be established for this state, respecting their liabilities in actions of this character, must be the same for both classes.

As to this proposition, we are of opinion that the argument of counsel, as well as the authorities cited, furnish much stronger reasons for maintaining the liability of *quasi* corporations, in view of their extended privileges and powers in this country, than for the rule of non-liability contended for as to municipal corporations proper.

The line of reasoning employed, if pursued to the extent insisted upon, would compel us to decide what may be an open question in this state, and one not presented by the record before us, viz., whether, under the statutes of this state, a county is liable to an individual for injuries resulting to him or his property from neglect of the county authorities to repair a bridge or highway. It is sufficient to say that we do not consider it either necessary or proper to decide that question in this case.

That *quasi* corporations, such as counties and unincorporated towns and villages, did not incur such liability by the rules of the common law, is clear from the decisions of the English courts. It is likewise true that the same rule of decisions, with few exceptions, has been followed in this country as to this class of corporations.

The doctrine seems to have been first announced in the court of king's bench in 1788, in the case of *Russell and others v. The Men Dwelling in the County of Devon*, reported in 2 Term Reports, 667.

The wagon of the plaintiffs was damaged in consequence of a county bridge being out of repair, and they brought suit for damages against the inhabitants of the county.

It was held that the action could not be maintained, the ground of the ruling appearing to be, that the county was not a corporation, and had no corporate fund or estate out of which a judgment for damages could be satisfied; if collected out of the private estate of one or more individuals, all the other inhabitants would be liable to contribute their respective proportions, and this would give rise to a multiplicity of suits for reimbursement; that even if the county could be regarded as a corporation, the principle that damages cannot be recovered against the corporators in their individual capacity, would prevent a recovery; also that there was no precedent for the recovery of a judgment, under such circumstances, save where the legislature had given a remedy.

We perceive nothing in the grounds assigned for denying the right of action, or in the reasoning of the court, to warrant an inference that such an action would not lie, at common law, against a municipal corporation, as to which the obstacles mentioned in that case did not exist. The almost necessary inference, from the language of the court, would seem to be the other way.

We have examined a number of the English cases cited in the briefs of counsel, and find that the right of action by individuals, against chartered municipal corporations, for damages sustained in consequence of a failure to repair public improvements, were usually upheld.

It was held in *Henly v. The Mayor of Lyme*, 5 Bingham, 91, that the corporation of the borough of Lyme, under the terms of its royal charter, was liable to an individual whose property had been damaged by an overflow of the sea, caused by the neglect of the corporation to repair certain banks, mounds and sea-walls.

Another leading English case, holding that a chartered corporation was liable for neglect to perform duties enjoined by the charter, was *Mersey Docks v. Gill* and *Mersey Docks v. Pierce* (tried together in one action), 11 House of Lords Cases, 686.

Plaintiffs were the owners of a cargo of guano, and when the ship carrying it arrived at the port of Liverpool, in endeavoring to enter one of the docks it struck against, and became imbedded in, a large bank of mud which had negligently been permitted to accumulate at the entrance, and the ship and cargo were damaged in consequence.

Mr. Justice Blackburn delivered the joint opinion of the judges who heard the argument, reviewed a long list of cases bearing on the questions raised, and held that defendants were liable. This opinion was approved by the House of Lords.

The basis of the recovery in these and similar cases seems to have been that the privileges and emoluments granted by the charters constituted a consideration for the performance of the duties imposed upon the corporations, and by the voluntary acceptance of the charters, the corporations had bound themselves, in the nature of a contract, to the performance of such municipal duties.

In *Henly v. Mayor of Lyme, supra*, the royal charter cast upon the corporation the burden of maintaining and repairing sea-walls and other public improvements, which formerly devolved upon the crown. As a consideration for the performance of the duties imposed, valuable franchises and property rights were conferred upon the corporation. It was considered in that case that the acceptance of the grant was the equivalent of a contract voluntarily entered into by the corporation to make the repairs.

When the *Mersey Docks Cases, supra*, were before the House of Lords, the lord chancellor, Cranworth, referred to the case of *Parnaby v. The Lancaster Canal Company*, 11 A. & E. 223, where it was held that the trustees, having the right, by virtue of their charter, to levy tolls for their own profit, in consideration of making a dock or canal, the common law imposed upon them the duty of taking reasonable care to keep it in such repair

that those choosing to navigate it might do so without danger to their lives or property. He then stated that the only difference between the latter case and the appeals under consideration was, that the appellants here, in whom the docks were vested, did not collect tolls for their own profit, but merely as trustees for the benefit of the public, adding: "I do not, however, think that this makes any difference in principle, in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by which the docks are managed."

Mr. Justice Blackburn, on the authority of *Coe v. Wise*, 5 Best & S. 440, says of corporations like the Liverpool docks, formed for trading and other purposes, that though they act without reward to themselves, yet in their very nature they are substitutions, on a larger scale, for individual enterprise. He then lays down the following rule in respect to their liability: "We think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals, should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works."

The justice further said that if the legislature had, by express enactment or necessary intendment, enacted that the trustees of the Liverpool docks should not be subject to such liability, it would be an end of the question; or if it were enacted that none of the revenues received should be applied to the purpose of discharging liabilities

of the corporation, it would go far to show that the legislature intended that it should not be liable. Other actions of the same character were sustained upon similar grounds.

In the case of *The Mayor of Lynn v. Turner*, Cowper, 86, an action for damages was brought against the corporation for not repairing and cleansing a certain creek into which the tide of the sea had been accustomed to flow and reflow. By reason of the neglect to repair, as had been the custom from time immemorial, the sea was prevented from flowing therein, the creek became unnavigable, and the plaintiff was obliged to carry his corn round about. The opinion of Lord Mansfield bases the liability of the corporation upon the ground of prescription, inferred from the fact that they had been accustomed to repair from time immemorial. He adds that it might be the very condition and terms of their creation and charter.

Upon due consideration of these and other cases, we are of opinion that sufficient similarity exists in the franchises conferred upon municipal corporations by our statutes with those granted by charter under the English laws to bring our corporations within the rule of the common law respecting duties and liabilities.

The differences between franchises conferred by royal charter on the one hand, and by our statutes on the other, relate more to the extent of the privileges granted than to the powers conferred.

Important powers and valuable benefits are granted in both instances, and in neither instance are they forced upon such corporations. Taking the most conservative view, they are voluntarily accepted by the citizens composing such municipal bodies.

We see no reason why these domestic, organizations, upon accepting the benefits of a charter of incorporation, conferring the powers ordinarily granted over streets and bridges, should not be held to assume corre-

responding burdens and responsibilities in respect to them.

In this case the special charter of the city of Denver, which is very similar in its provisions to the general incorporation acts, vests the complete control and government of the city in the corporation. It is empowered to make all necessary ordinances, and to elect and appoint all necessary officers, to carry into effect the powers granted. The corporation is empowered to take, hold, possess and enjoy both real and personal property, by deed, gift, bequest or otherwise, and to sell and convey the same for the use of the city. It is empowered to sue and be sued, and ample provision is made for the raising of revenue for all purposes of the corporation. Full supervision and control is given over streets and bridges, with power "to establish, erect and keep in repair bridges;" and to establish grades, open, alter, abolish, widen, pave, grade, or otherwise to keep the streets and avenues in repair, and to remove all obstructions, and to prevent all encroachments into or upon the same.

A strong implication arises, upon the language employed in the charter, that it was the legislative intention, in conferring upon the city the full supervision and control over the streets and bridges within its corporate limits, with the means of creating a corporate fund for all necessary purposes of the corporation, that the city should assume the burden of keeping the streets and bridges in repair. If such can be said to have been the legislative intent, the liability for damages resulting to individuals from neglect to repair, logically follows, and the principle of the common law doctrine becomes applicable.

That doctrine seems, in brief, to have been, that the grant and acceptance of franchises from the government, whether by individuals or corporations, imposed upon the grantee the duty of performing all the conditions upon which it issued, whether such conditions were expressly

stated in the grant, or arose by necessary implication as the consideration of the grant.

We are aware that this view is not in harmony with all the adjudications upon the subject in this country, but we believe it to be founded in sound reason, and know that it has the sanction of a great preponderance of authority.

In *Weightman v. The Corporation of Washington*, 1 Black (U. S.), 39, which was an action brought against the corporation to recover damages for injuries sustained by the falling of a bridge constructed by the corporation, the point was raised that no action would lie at common law in such a case. Mr. Justice Clifford, in announcing the opinion of the court, ruled against the objection, remarking: "Reference is often made to the case of *Russell v. The Men of Devon* (2 Term R. 667) as an authority to show that no action will lie against a municipal corporation in a case like the present; but it is a misapplication of the doctrine there laid down. Suit was brought in that case against the inhabitants of a district, called a county, where there was no act of incorporation, and the court held that the action would not lie; admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether that be so or not, the rule here adopted has been fully sanctioned in all the English courts."

The rule referred to in the opinion as adopted in that case was that, when a duty was imposed upon a municipal corporation by its charter to keep a bridge in repair, in consideration of privileges granted thereby, the means to perform being within the control of the corporation, it became liable for damages sustained by individuals from neglect to comply with the requirement.

The only difference we observe between that case and the case at bar is that the duty of repairing and rebuilding were there expressly enjoined by the charter, whereas

they arise, as we think, by necessary implication in the present instance.

The supreme court of Virginia, referring to the English adjudications upon this subject, say: "These decisions proceed on the ground that where a municipal corporation acts in the exercise of powers, or the discharge of duties, in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common law liability for the acts of its servants; and that it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burthen accepted under the charter in consideration of its privileges." *The City of Richmond v. Long's Adm'rs*, 17 Gratt. 375.

Mr. Justice Selden, in his very able opinion in *Weet v. Trustees of the Village of Brockport*, 16 N. Y. 161, makes the declaration that "upon investigation it will be found that, from the earliest period of the common law, all grantees of franchises, whether individuals or corporations, have been held by a uniform and unbroken series of decisions to the strictest performance of every condition of the grant, either express or implied."

Mr. Justice Hunt, referring to the case of *City of Detroit v. Blackeby*, 21 Mich. 84, and other cases which hold that no such liability attaches to incorporated cities, says: "The authorities establishing the contrary doctrine, that a city is responsible for its negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them." *Barnes v. District of Columbia*, 91 U. S. 540.

See, also: *Nebraska City v. Campbell*, 2 Black (U. S.) 590; *Weet v. Village of Brockport*, 16 N. Y. 161; *City of Dayton v. Pease*, 4 Ohio St. 80; *Erie City v. Schwingle*, 22 Pa. St. 385; *Soper v. Henry County*, 26 Iowa, 264;

Browning v. City of Springfield, 17 Ill. 143; *Town of Waltham v. Kemper*, 55 Ill. 346; *City of Richmond v. Long's Adm'rs*, 17 Gratt. 375; *Mears v. Com'rs of Wilmington*, 9 Iredell, 73; *Jansen v. City of Atchison*, 16 Kan. 358; *Smoot v. Mayor of Wecumpka*, 24 Ala. 112; *Grove v. City of Fort Wayne*, 45 Ind. 429; 2 Dill. Mun. Corp. (3d ed.) secs. 980, 1017. The above list might be largely extended.

While the decisions of many respectable courts are opposed to the foregoing views, we are satisfied that the rule announced for this state is a safe and equitable one. That it ought to be the law, is evident from natural reason and the plainest principles of justice. That it is the law, sufficiently appears from precedent and the decided weight of authority. Whether a logical distinction is made, by the courts of this country, between municipal corporations and *quasi* municipal corporations, respecting the liabilities of the two classes, in view of the greater powers and privileges now conferred upon the latter class by the statutes of the several states, does not affect the question under consideration. The general current of authority supports the view, that when municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement and repair, a duty arises to the public, from the nature of the powers granted, to keep the avenues of travel within such jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by a neglect to perform the duty. That the same rule obtains in such case, whether the duty is specifically imposed by the act of incorporation or not. This duty is municipal or ministerial, and not governmental, as asserted by appellant.

This view of the case, and the rule here announced, in

nowise conflicts with the ruling referred to in *Daniels et al. v. City of Denver*, 2 Col. 669. The failure or neglect there complained of, was the failure to exercise a discretionary power conferred by the charter, to wit, the power of making sewers and drains. All courts agree that the failure to exercise a discretionary power is not actionable. But the neglect here complained of, is to keep in repair improvements made by the city. When the power to construct such improvements is assumed, the duty to keep them in repair is fairly implied and becomes peremptory.

Common reason teaches that streets and bridges must be kept in a safe condition for ordinary use. Under the charter of this city, no one, without authority from the corporation, can in any manner interfere with its streets or bridges, either for the purpose of making repairs or otherwise. The duty of making repairs is essentially a corporate, as distinguished from a governmental duty, and it does not extend outside the corporate limits. Property within the city limits is not taxable for road purposes outside such limits.

For the reasons assigned the city must be held liable, unless the exceptions reserved by the appellant upon the trial in the district court, and referred to by its counsel under the second head of his argument, shall disclose sufficient error to warrant a reversal.

First. Under the second head of the argument, it is claimed that the right of recovery was defeated by the contributory negligence of the appellee.

The general rule on this subject is, that, to entitle the plaintiff to damages, he must have used reasonable or ordinary care to avoid the accident; that is, such care as is usually exercised, under like circumstances, by persons of average prudence.

If the plaintiff, in his own case, shows that he brought the injury upon himself by his own carelessness, he may be nonsuited; but if the defendant's failure of duty, and

the injury to the plaintiff, are shown, and it does not appear that plaintiff brought on the injury by his own negligence, such proof must come from the defendant. Wharton on Negligence, secs. 423 to 427; *Mayo v. Boston & Maine R. R.* 104 Mass. 137; *K. P. Ry Co. v. Twombly, Adm'x*, 3 Col. 125.

Williams, J., says, in *W. C. & P. R. R. v. McElwee*, 67 Pa. St. 315, "It is always a question for the jury, when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury, to determine what it is, and whether it has been complied with." The following is mentioned as an exception to this rule: "When there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law."

Another judge cites several cases as properly withdrawn from the consideration of the jury, on account of inexcusable acts appearing therein, as attempting to cross a railroad track by going between two cars in motion; leaping from a train in motion; crossing a railroad track in front of an approaching train without looking up, and the like; adding, "But in all these cases there was no dispute about the facts; nothing material was left in doubt. There was no question as to the credibility of witnesses, and nothing was left to be inferred in the way of explanation or excuse." *Brooks v. Somerville*, 106 Mass. 271.

In the case at bar the plaintiff's testimony had made out a *prima facie* case against the defendant, at the time the motion for nonsuit was presented. It had been shown that the appellant had permitted a bridge in one of the principal thoroughfares of the city to become unsafe for

the ordinary use to which it was daily subjected; and, with full notice of its unsafe condition, had failed to either properly repair it, or to give any warning of its unsafe condition; that while one of the freight teams belonging to the City Transfer Company, of which appellee was foreman, was crossing the bridge with a load of rock, of less than the ordinary weight for such teams, a wheel of the wagon crushed through the floor of the bridge, going down to the hub, and while endeavoring to pry it up, by the use of levers and fulcrums, the timbers gave way and the bridge fell to the bottom of the creek, carrying the appellee with it and breaking his leg. According to his own testimony he did not know the bridge was unsafe. He did know that the surface of the bridge was worn by the immense traffic over it, and that it would shake when a load of freight was crossing, but did not know of the unsoundness of the frame or timbers.

. It is difficult to perceive, in view of the authorities, how it could be determined, as a question of law, at the close of the appellee's testimony, that he had been guilty of contributory negligence. Such conclusion could only be reached by deciding that he did not adopt proper means to extricate the wagon. Up to that time no proof to that effect had been introduced. It could only have been inferred from the falling of the bridge. As appellee's counsel aptly say, "the very inquiry was, whether the means employed were careful and prudent, and this was a question for the jury."

It is clear that, at this stage of the case, no cause existed for taking the case from the consideration of the jury.

The same authorities and the same considerations demonstrate that the question of contributory negligence was properly submitted to the jury at the close of the trial, after all the testimony was in. There was then a dispute about the facts; there were questions as to the

credibility of the witnesses, and the main question, whether proper measures and appliances were employed to extricate the wagon, was, we think, in doubt.

That an expert bridge builder was able to testify that the appellee was negligent, on information of the condition of the bridge and bridge timbers, and upon mathematical calculations of the amount of weight or pressure brought to bear upon one stringer of the bridge, is not conclusive.

The appellee was not an expert. He did not know as much about the strength and condition of the bridge as the witnesses did; and while it was his duty to use reasonable and ordinary care to avoid the accident, it was not necessary to suspend the work of extricating his wagon for mathematical calculations as to the strength of the bridge. The question is, whether he acted as a person of average prudence would have acted under like circumstances, and this question was properly left to the jury.

Second. Upon the exception reserved to the overruling of the motion for a new trial, on the ground assigned by appellant, that the damages given by the jury were excessive, many of the same principles just announced apply. The true measure of damages is, as contended for, compensatory only. But where the amount of damages does not depend on computation, as in cases for personal injuries, as we said in *Wall et al. v. Livezey*, 6 Col. 465: "It is exclusively the province of the jury to estimate and assess the damages, and the amount to be allowed in such cases rests largely in their sound discretion." And, as there announced, to warrant the court in interfering with that discretion, it must be apparent that the amount of damages given by the jury is so disproportionate to the injury received as to show that the jury were influenced by prejudice, misapprehension, or by some corrupt or improper consideration. See authorities in opinion; also, *Stillman v. Proprietors of Canal Bridge*, 16 Pick. 541.

Where there is no fixed standard for computing the damages, but the measure thereof rests in the exercise of sound judgment and discretion, different minds are likely to arrive at different results upon consideration of the facts of a given case. The case before us furnishes an illustration of the proposition. The jury, upon consideration of the loss of time, expenses incurred, and the inconveniences and sufferings consequent upon the injury received, adjudged the plaintiff to be entitled to a certain compensation. The district judge thought the amount awarded exceeded actual compensation by the sum of \$500, and required the plaintiff to remit that sum, which was done. If the duty of assessing the damages devolved upon this court, we might fix a still smaller sum as the result of our judgment. But this is not the test. It was the province of the jury to determine the amount, and we cannot say, as matter of law, that the amount of the judgment is so exorbitant and disproportioned to the injuries received as to warrant us in declaring it excessive.

Third. Upon the error assigned respecting the admission of improper evidence, appellant claims that error was committed in allowing the plaintiff to show, in rebuttal, a different arrangement of the blocks and lever from that brought out in the original presentation of his case. Counsel says that the appellant was injured by this ruling, because expert witnesses had been called by appellant, and had testified to hypothetical questions based on the facts as originally submitted, and that the admission of the testimony complained of tended to confuse the minds of the jury as to the position of the lifting apparatus, and to weaken the effect of the expert testimony.

The order of proof specified by the Civil Code confines the parties, after the introduction of their evidence in chief, to rebutting evidence, "unless the court, for good reasons in furtherance of justice, permits them to

offer evidence in their original case." Civil Code, sec. 168.

If, by inadvertence, the appellee omitted to produce, as testimony in chief, all the facts relating to the manner and means employed to extricate the wagon, the court had the discretion to allow the omission to be supplied at a later stage of the trial. But the appellant was entitled to have its expert testimony go to the jury, upon the appellee's full case on this point. Had appellant offered to recall its experts after the admission of the new testimony, and the offer been denied, there would have been ground of complaint. But no such offer was made. The mere statement that the expert witnesses had been dismissed and could not be recalled, is not sufficient to maintain the error assigned. The judgment must be affirmed.

Affirmed.

THE CITY OF DENVER V. MULLEN ET AL.

1. A provision in the charter of a city conferring authority on the council "to make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and prevent and abate the same," will warrant the declaration by general ordinance of what shall constitute, and the conditions and circumstances under which a given thing shall become and be deemed a nuisance, but does not authorize the council, by mere resolution or motion, arbitrarily to declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination.
2. Only those nuisances may be abated summarily which affect the health or interfere with the safety of property or person, or are tangible obstructions to streets and highways, under circumstances presenting an emergency, etc.,—such as are clear cases of nuisance *per se*. In other cases, judicial determination is necessary before a thing can be abated as a nuisance, either by the public or a private person.
3. A nuisance which is exclusively common or public cannot lawfully be abated at the suit of private individuals; the remedy is by indictment or criminal prosecution, unless other remedy has been

7	345
8	141
7	345
15	581
7	345
17	380
17	588
7	345
2a	102
7	345
19	185

provided by statute. A private nuisance may be abated by the party aggrieved; a nuisance which is both public and private may be proceeded against either by the public, or by the private individual affected thereby. In case of private nuisance, the aggrieved party may elect to abate the same, or have his action for damages. A civil action by the proper officers, on behalf of the public, will also lie to abate a public nuisance.

4. Almost every case involving the question of nuisance in the use of property is to be determined in view of its own circumstances, and, as a general rule, the relative rights of the parties control—the question being, whether or not the use of the property in the manner complained of is reasonable, and in accordance with such relative rights. What constitutes a nuisance is a question of law for the courts; whether the results of a given business are so common as to amount to a public nuisance, is a question of fact for the jury; as is the question, whether a particular use—not a misuse *per se*—is an unreasonable use and a nuisance.
5. A corporate existence and validity of the acts of a *de facto* corporation whose user is established cannot be attacked collaterally upon the ground of an irregularity or omission in its certificate of incorporation.
6. A municipal corporation which accepts the dedication of streets, across which a ditch has been previously located and right of way therefor acquired, takes the same subject to the prior rights of the owners of the ditch. And when the necessities of the public require that such ditch be bridged at the street crossings, it is the duty of the city, and not the owner of the ditch, to construct such bridges.
7. The government does not part with title to the public domain until the issue of a patent therefor; however, when such patent has issued, the title conveyed thereby is held to relate back to the date of the entry, as evidenced by the certificate thereof, but will not relate back to an act of congress authorizing the entry merely.
8. The authority conferred by the act of 1861, incorporating the city of Denver, in respect to the control of the streets by the city, cannot be extended to invalidate the acquisition thereafter by ditch proprietors of the right of way through the lands which were then a part of the public domain, and prior to the acquisition of title thereto by the city, although the streets had been previously laid out and used as streets.

Error to District Court of Arapahoe County.

THE facts are stated in the opinion.

Mr. JOHN C. STALLCUP, for plaintiff in error.

Messrs. MARKHAM, PATTERSON and THOMAS, for defendant in error.

STONE, J. The defendants in error, J. K. Mullen, Dennis Mullen and Charles R. Davis, who were the plaintiffs below, applied to the judge of the district court for relief, by way of injunction, against the city of Denver, the mayor and the street commissioner thereof, to restrain the said parties from interfering with the flow of water in a certain irrigating and mill ditch, known as the Platte and Denver Ditch, which conveys water to the flouring mills of said complainants, situate in that portion of the city known as West Denver. The bill of complaint averred that the ditch was constructed in 1865 by a corporation incorporated in 1864 under the general incorporation law of the then territory of Colorado; that the complainants were lessees of the said ditch company, possessing as such lessees the right to the use of the said water in operating the two flouring mills owned by the said Mullens and Davis respectively; that the grinding capacity of said Mullen mill is one thousand one hundred and fifty bushels of wheat, and that of the Davis mill about six hundred bushels each twenty-four hours; that said mills are run chiefly by water power from said ditch; that complainants had a right to the flow and use of said water for the purpose aforesaid, without interference by the defendants; that defendants had, with force and violence, torn out a certain flume in the said ditch and diverted the water therefrom, and were threatening to continue such diversion of the water, to the great and irremediable damage of complainants, and said complainants therefore prayed a writ of injunction to restrain the said acts of defendants, and for all proper relief in the premises.

The answer of defendants below denied severally the allegations of plaintiffs' bill, and set up ownership in

fee by the city of the streets and alleys therein, denied the right of plaintiffs to obstruct the same by the ditch wherever it crossed the same, and averred that the interference with the ditch was attempted and asserted only upon refusal of plaintiffs to bridge the streets at the ditch crossings, so as to permit the free and convenient use of said streets by the public. The defense further set out, by way of cross-complaint for affirmative relief, that the ditch in question runs through and across the following named streets in Hunt's addition to the city, to wit: Carson, Martin, Bear, Buffalo, Moose, Deer, Olive, Capitol, South Tenth, South Ninth, South Eighth, and half of Colfax avenue, together with the intervening alleys; and also the following named streets within that portion of the original limits of the city known as the congressional grant, to wit: Champa, Curtis, Lawrence, Larimer, Holladay, Wazee, Wynkoop, Eighth, Ninth, and a portion of Colfax avenue, together with the intervening alleys; that the said ditch and the conveyance of water therein is an obstruction to the public and necessary use of the streets; that the crossings of the said ditch in the streets, where the same are not bridged, are inconvenient and dangerous to the public; that the city rightfully owns and controls said streets, with authority to control and regulate the use of the same, and prays that the said ditch be abated, the water turned off and the ditch filled up, so as to prevent the further obstruction to the public use of the streets, and for full relief, etc.

To this answer a replication was filed denying the right of the city to interfere with the said ditch, so as to prevent the flow of water to the mills of the plaintiffs, and averring that the grantors of plaintiffs had a right to said ditch and the use of the water therein, prior in time and superior in law to any claim of the city in respect to the streets and alleys where the same cross said ditch; that they have been in the undisturbed exercise of such right for nearly eighteen years; that the owners of the

land through which the ditch runs, as well as the said city of Denver, have authorized and licensed the plaintiffs and their grantors to use the said ditch, and convey the water through the same for the purpose of operating said flouring mills, and that therefore the plaintiffs are not bound to bridge the ditch where the streets cross the same; that the ditch is used to irrigate a large extent of farming country along its line above the mills.

In reply to the matter of the cross-complaint of the defendants, the plaintiffs admit that the ditch, together with the waste water below the mills, runs through or across the streets mentioned in defendants' answer, but aver that, as to all the streets and alleys in Hunt's addition, the ditch company acquired its right of way long prior to the time when said lands became a part of the city; that the ditch was constructed and used for more than ten years prior to said lands becoming an addition to the city; that said lands became a part of the city and were accepted by the city as such addition with full knowledge of all the existing prior rights of said ditch company therein, and, therefore, that plaintiffs were not bound to bridge said ditch where streets crossed the same in said addition; that in respect to the streets and alleys crossing said ditch within that part of the city included in the congressional grant, plaintiffs reply that they had a vested right to said ditch, and to the flow of water therein, long prior to the time when the city acquired or had any right to or authority over the said streets and alleys, or any title to the lands embraced in the said congressional grant, and have exercised such prior rights, unmolested by the city, and with the leave and license of said city, for the period of more than seventeen years, and hence are not bound to bridge the streets within the limits aforesaid.

A preliminary injunction was issued in accordance with the prayer in the complaint, and afterwards, in support of the respective allegations in the pleadings,

proofs were taken before a referee, and the cause coming on to be heard upon the said pleadings and proofs, the court decreed that as to the defendants, the mayor of the city and the street commissioner, they were not necessary parties to the action, and the same was, therefore, dismissed as to them.

The court further decreed as follows, to wit:

“And the court doth further find, order, adjudge and decree as to the defendant, the city of Denver, that the plaintiffs are lawfully and of right entitled to the full, unobstructed flow of the water through and along the Denver and Platte ditch to the mills of the said plaintiffs, respectively, without any let, hindrance or obstruction of the water in said ditch, and without any interference with said ditch by said city of Denver, or its agents or employees; and doth further order, adjudge and decree, that the said city of Denver, its agents, attorneys and employees, be forever restrained and enjoined from cutting down or destroying or injuring the banks or flumes of the said Denver and Platte ditch, and from filling up or obstructing the said ditch or any part thereof, and from in anywise or manner interfering with said ditch or the water therein, so as to obstruct the flow of the water to the mills of the plaintiffs aforesaid, and from in anywise or manner diverting or turning the water from said ditch.

“And the court doth further order, adjudge and decree, that inasmuch as it appears to the court that the said defendant, the city of Denver, is not entitled to any relief for any matter or thing set up or contained in the second defense of said defendants' answer, said second defense being in the nature of a cross-complaint and asking for affirmative relief, the said cross-complaint in said answer be dismissed. And it is further ordered by the court, the said defendant, the city of Denver, pay the costs of this suit.”

Exceptions were taken to the overruling by the court

of a motion to set aside the findings and judgment of the court, and for a new trial, and thereupon the city prosecutes its writ of error herein.

Aside from certain objections relating to the admission of testimony, which will be referred to hereafter, the assignments of error may be summed up in the two numbered seventh and eighth, to wit: That the court erred in its findings of law and facts, and in its judgment and decree for the defendants in error. Our main inquiry, therefore, is whether, upon all the facts and circumstances disclosed in the case, pertinent thereto, and upon the law properly applicable thereto, the judgment and decree of the court below was warranted and should stand.

The city, in its attempted interference with the ditch, evidently proceeded upon the theory that such ditch, with respect to the streets of the city which it crossed, and the public use thereof which it incommoded and obstructed, was to be deemed and treated as a nuisance, which, on behalf of the public affected thereby, the said city had authority to abate as such in the summary manner pursued. The correctness of this position is contended for by the city attorney in argument filed herein.

From the testimony and exhibits taken and filed in the cause, it appears that on the 6th of March, 1882, a written notice, signed by Robert Morris, the mayor of the city, was served the same date upon Davis, one of the defendants in error, ordering him "to remove the obstruction now on Carson street, in the city of Denver, within thirty days from the service of this notice, the said obstruction being a mill ditch crossing said street, which ditch you must remove or properly bridge, so that the public convenience in the use of said street will not be interfered with by the said ditch," etc. The like notice, dated the 11th of March, was served upon John K. Mullen, one of the other defendants in error. On the 5th day of May following, on motion adopted by the city council, "the

street commissioner was ordered to turn off the water in the mill ditch and fill it up at the crossing of Colfax avenue;" and on the 18th of May thereafter the following motion was adopted by the said city council, viz.: "On motion of Alderman Lessig, the street commissioner was again instructed to divert the water of the West Denver mill ditch into the Platte river or Cherry creek, inside the city limits, as may be prescribed by the city attorney." Mr. Stallcup, the then city attorney, testifies that, after the adoption of the foregoing second motion or resolution, Mr. Mullen called at his office, and a meeting was arranged, at which the plaintiffs below, and their attorneys, appeared, when said plaintiffs proposed to pay half the expense of bridging Wazee and two other streets, but which proposition was refused, and nothing further was done by way of compromise, and that he, said city attorney, then instructed the street commissioner to turn the water out of the ditch at a point within the congressional grant part of the city, and to convey the same into the irrigating ditches and into Cherry creek, but that nothing was done, as the mayor was served with process in this suit on that or the following day.

It further appears in testimony that certain officers of the city, shortly after the passage of the resolutions by the council, turned the water out of the ditch by opening the side-gates and cutting the banks of the ditch near the head-gates, and by breaking the flume below the head-gates, throwing the planks out into the river, and effectually stopping the flow of water in the ditch; that this was at a point six or seven miles from the mills, and three or four miles beyond the limits of the city; that, finding the water gone out of the ditch, Mullen and Davis went to the head of the ditch and attempted to repair the break and turn the water in again, when, about midnight, several persons, representing themselves to be officers of the city, interfered and prevented such repairs, showing their arms, pistols and cartridges, and stating

that they were instructed to use their arms if necessary, and one of them saying, as the witness Davis testifies, that "they had instructions to blow hell out of any one attempting to turn water in the ditch."

It will scarcely be contended that this manner of proceeding was in accordance with either the resolutions of the city council, above set forth, or the instructions of the city attorney, nor can it be contended that there was any authority for interfering with the ditch beyond the limits of the city.

The basis of authority for the action of the city in the premises is made to rest upon certain provisions of the city charter, and certain ordinances, which are set out as exhibits in the testimony; and the following, among other of the enumerated powers conferred by the legislature upon the city, in said charter, is relied upon, viz.: "To make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same."

The proper construction of this language is, that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughter houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. *Everett*

v. Council Bluffs, 40 Iowa, 66; *Yates v. Milwaukee*, 10 Wall. 497. No law or ordinance, under which the city council assumed to act in respect to this ditch, has been cited which defines nuisances, or within the meaning of which such ditch is comprehended.

Nor would it be sufficient if it could be said that the ditch, as an obstruction of the streets, was a public nuisance at common law, for in such case it could be proceeded against only by indictment, or by civil proceeding instituted on behalf of the public by its proper officers. Wood on Law of Nuisances, sec. 729, and cases cited; 2 Dillon, Municipal Corporations, sec. 659.

It is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency; such clear cases of nuisances *per se*, are well understood, and need not be further noticed here, to distinguish them from the case before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets, at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se*. It was constructed for a necessary, useful and lawful purpose, was used for such purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor as a matter of fact was it a nuisance while it was no hurt, detriment or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about neither by the ditch itself, nor its use. Indeed, the sole matter complained of, to warrant its being regarded as a nuisance, is the absence of bridges at street crossings. The town has become populous; its growth has extended beyond the ditch and along its line for a great distance; streets laid out across its course have come to be traveled so much,

that, without bridges, the ditch, as appears by the testimony, has become inconvenient, detrimental, and an obstruction to the full, safe and lawful use of such streets as highways by the public. To this extent, and from these causes outside the ditch and its use *per se*, has the ditch come to be a public nuisance, if, as a matter of fact, it is such. But whether it is such or not, is a fact which must first be ascertained by judicial determination before it can be lawfully abated, either by the public or by a private person.

As we have already said, there are certain kinds of nuisances which may be summarily removed or abated, either by the public authorities or by private individuals, but we are attempting here only to declare the law applicable to cases of the nature and character of the one before us.

In the case of *Griffith v. McCullum*, 46 Barb. 561, the supreme court of New York, after considering what constitutes a nuisance, public or private, and the remedies therefor, summarizes the law touching the same, as follows:

“1st. That every encroachment upon a highway is not a nuisance. * * *

“2d. That that which is exclusively a common or public nuisance cannot lawfully be abated by the private act of individuals; the remedy is by indictment, or criminal prosecution, unless some other remedy has been provided by statute.

“3d. A private nuisance may be abated by the party aggrieved.

“4th. A nuisance may be a public and a private nuisance. In such a case, the public may proceed by indictment to abate it, and punish its author; or those individuals to whom it is a private nuisance, by reason of its being especially inconvenient and annoying to them, or that they are in some particular way incommoded thereby, may, of their own act, abate it.

"5th. In the case of a private nuisance, the aggrieved party has an election of remedies; he may remove the nuisance, or he may have his action for the private damages sustained by him; he cannot have both remedies."

Besides the remedy by indictment, a civil action will lie to prevent or abate a public nuisance, on behalf of the public, by its proper officers. *Attorney-General v. M. & E. R. R.* 4 C. E. Green Eq. 387; *State v. Berdotte*, 73 Ind. 186; *Taylor v. Armstrong*, 24 Ark. 102; *Metropolitan City Ry v. Chicago*, 96 Ill. 620; Wood's Law of Nuisances, sec. 729, and cases cited.

Almost every case involving the question of a nuisance in the use of property is to be determined in view of its own circumstances, and, as a general rule, the relative rights of the parties control; the question being, whether or not the use of the property in the manner complained of is reasonable, and in accordance with such relative rights. Wood's Law of Nuisances, sec. 12.

"As to what constitutes a nuisance is a question for the court, and not the jury to determine; whether the results of a given business are so common as to amount to a public nuisance is a question for the jury." *Ibid.* sec. 22.

And the same author states the rule in such cases to be, that "the question is not whether an act has been declared to be, but does it come within the idea of a nuisance; if so, it is one, though never held so before; if not, it is not one, though held so a thousand times before." *Ibid.* sec. 27.

Whether a particular use, that is not a nuisance *per se*, is an unreasonable use and a nuisance, is a question of fact, to be judged of from the circumstances of each case by the jury. *Ibid.* sec. 251, and cases cited.

In treating upon the powers of municipal authorities relating to nuisances, Mr. Wood, in his work referred to, says in respect to such things as are not nuisances *per se*, that they must be lawfully ascertained to be such;

that the municipal authorities cannot arbitrarily declare a thing a nuisance, or destroy valuable property which was lawfully erected or created, without such lawful ascertainment; that even if power therefor has been expressly conferred by the legislature, it is inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it; and except in cases of emergency, or when the use is clearly a nuisance, the fact should be first established by judicial adjudication. *Vide* sec. 740 and the authorities cited.

In the case of *Yates v. The City of Milwaukee*, 10 Wall. 497, the supreme court of the United States, per Mr. Justice Miller, say: "But the mere declaration by the city council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character.

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." The same doctrine is laid down in the case of *C., R. I. & P. R. R. v. Joliet*, 79 Ill. 25-44; *Everett v. Council Bluffs*, 48 Iowa, 66, and numerous other authorities.

It is therefore quite clear that the plaintiffs below were entitled to the injunction prayed for in the first instance, restraining the city from interference with the use of property which had not been lawfully ascertained and declared to be a nuisance. Upon the record, however, presenting the testimony taken upon the hearing, we are to determine whether the court below was warranted

in decreeing the injunction perpetual upon the facts established by said testimony.

The fact that the construction of the ditch was begun in the fall of 1864, and completed in the spring or summer of 1865, by a company duly incorporated under and by virtue of the general incorporation laws of the territory of Colorado, is fairly established. The only question of error, based upon objection to evidence admitted, which is specifically presented for our consideration, relates to the certificate of incorporation of this ditch company. The admission of this certificate, as evidence, is objected to, and the validity of the corporation, and its rights and the rights of its lessees, the defendants in error, are denied, on the ground that the certificate omits to specify what stream the water of the ditch is to be taken from, the terminal points of the ditch, and other specifications which, by the statute, the certificate is directed to contain.

That the corporate existence and validity of the acts of a *de facto* corporation whose user is established cannot be attacked collaterally upon the ground of an irregularity or omission of this nature in its certificate of incorporation, has been decided by this court in the case of *Humphreys v. Mooney*, 5 Col. 282, for the reasons and upon the authorities therein cited.

The ditch, then, must be held to have been lawfully constructed. It is shown to be six or seven miles long; that it receives its water out of the Platte river at a point on the stream four or five miles above the city; that ever since its completion in 1865, the water flowing through it has been used to irrigate several thousand acres of farming lands beyond the city limits, and for grinding wheat in the mills of defendants in error, situated within the limits of the original town site of Denver. That which is complained of, on the part of the city, to be a nuisance, does not arise out of either the nature of the ditch itself or the manner of its use by the defendants in error. The

reasonableness of the use is not questioned, although the absolute necessity of such use as a motive power for the mills is denied by the plaintiff in error. Admitting, then, that the testimony shows that by reason of the increase in travel and traffic upon the streets crossing the ditch, consequent upon the growth of the city, the ditch is such an obstruction to the use of the streets as to be properly deemed a highway nuisance, we may also say that its character as a nuisance is not by such testimony established to exist in any other respect than as such obstruction to certain streets; and further, such character consists solely in the absence of bridges at the crossings, and is wholly contingent upon this circumstance.

The removal of the nuisance, therefore, without the destruction of the property in question or interference with its use, as heretofore enjoyed by defendants in error, can be effected by bridging the ditch properly at the street crossings.

This narrows the controversy down to the real question involved in this branch of the case, viz.: Which party is liable for the construction of these bridges, the defendants in error or the city? If the former, then the decree of the court below should be modified accordingly; if the latter, then the decree need not be disturbed.

The question, therefore, to be determined is one dependent upon the relative rights of the parties to this action respectively.

As to all the streets intersected by the ditch outside of the original limits of the city, known as the congressional grant, the testimony shows that the ditch was constructed seven or eight years before these streets were laid out. The plat of Hunt's addition, which we understand to be the oldest of the additions to the city on the line of this ditch, was filed in 1872. The ditch in question was marked on the map or plat of this addition as filed, and

the right of way for said ditch had been previously acquired by the ditch company of the owners of the lands embraced in this addition.

Under this state of facts, we think it clear that the owner of this addition dedicated the streets he had laid out, intersecting this ditch, subject to the pre-existing right of way of the said ditch, and it seems equally clear that the city should be held to have accepted such dedication and acquired control of these streets subject to the same pre-existing rights of the proprietors of the ditch. The city having thus acquired the fee and control of these streets, in trust for the public, under the conditions of the grant and dedication, must render them passable and keep in repair as the public necessity and convenience require, without interfering with the rightful and accustomed use of said ditch; that is to say, the use of said ditch to the same extent and for the like purposes enjoyed thereby prior to the grant and dedication of the streets to the city, as aforesaid.

With respect to the streets intersected by the ditch within the congressional grant, a different state of facts exists, and a more difficult question is presented.

The company for the construction of this ditch was incorporated October 8, 1864. The construction was commenced thereafter, that same year, and completed the spring or summer following. The fact is conceded, that, long prior to the date of the incorporation of said company and the construction of the ditch, the streets of that portion of the city included in the congressional grant and intersected by the ditch, to wit: Champa, Curtis, Lawrence, Larimer, Holladay, Wazee, Wyncoop, Eighth and Ninth streets, were laid out and mapped the same as they now exist, and the map filed as of record in the proper office of the county records. At this time the title to the lands included in the city of Denver, as laid out and mapped as aforesaid, was in the United

States, the lands being a part of the public domain, under the control of, and subject to disposal by, the general government.

On the 28th of May, 1864, an act of congress, entitled "An act for the relief of the citizens of Denver, in the territory of Colorado," was approved; which act authorized the entry of the tract known as the "congressional grant," by the probate judge of the county including such tract, in trust for the inhabitants, as a town site. This entry was made by such probate judge, and a certificate of the entry thereof was issued on May 6, 1865, and a patent for the same was thereafter issued June 8, 1868.

The city of Denver was incorporated by act of the legislature of the territory of Colorado, at the first session of such legislature in 1861, and by said act the municipal authorities were authorized to have and exercise general control of the streets, alleys and highways within the city.

Upon this state of facts it is contended, on behalf of the city, that, at the time of the construction of the ditch, the city, by reason of the prior laying out of the streets, and the authority conferred by the charter or act of incorporation mentioned, acquired and still possess the right to require the proprietors of the ditch to bridge the same at the street crossings when necessary, and that the construction and use of said ditch has always been subject to such right of the city.

On the other hand, it is contended, on behalf of the defendants in error, that, chiefly for the reason that at the date of incorporation of the ditch company and the construction of said ditch the title to the land in question was in the United States, and not in the city, no prior valid right accrued to the city to exact of the ditch proprietors the requirements in controversy.

In further support of the contention on behalf of the city, the point is made in argument, that the title of the

city to the lands acquired by the entry of May 8, 1865, relates back to the date of the act of May 28, 1864, authorizing the entry. We cannot assent to the correctness of this proposition. This last mentioned act is not in the nature of a grant, but is simply a provision to enable the city to acquire title to land for a town site, if it should thereafter elect to avail itself of the provisions of the act; and it is not perceived upon what principle the title subsequently acquired by the entry could relate back to the act mentioned, any more than the title acquired by entry of public lands by a private citizen can relate back to the date of the law of congress which authorized such entry; and in the case of such entries, under the acts of congress for the disposal of the public domain, it is not questioned that the title accrues to the party making the entry at the date of such entry, and not before. The government itself does not really part with the title until the issue of the patent therefor; but upon the issue of such patent, the title conveyed by the grant is held to relate back to the date of the entry as evidenced by the certificate thereof.

Can it be said that the city acquired such a right to the streets, under and by virtue of its charter in 1861, as would enable it to assert such right as superior to the rights subsequently acquired by the ditch company? We think not. The act of congress creating the territory of Colorado, usually called the organic act, approved February 28, 1861, limited the legislative power of the territory to "all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act;" and in the same section declares that "no law shall be passed interfering with the primary disposal of the soil;" and also prohibits the passing of any law "impairing the rights of private property." While the conferring upon the municipal authorities of a town the power to control generally the streets, looking to their necessary and proper use as such by the public,

is certainly a rightful subject of legislation, yet it is to be borne in mind that ditches and artificial streams of water for irrigating, milling and other like purposes, were of such prime necessity in regions like Colorado, that the legislation of congress, as well as of the territory, has frequently declared the paramount value of the rights springing from such necessity, and the courts have been very careful to guard such rights.

In the case of *Broder v. Water Co.* 11 Otto, 274, which was an action to have a certain irrigating ditch or canal declared a nuisance and abated as such, the act of congress of July 26, 1866, was involved. The ninth section of this act declares that "whenever, by priority of possession, *rights* to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

The supreme court of the United States, in construing and applying this provision of the act to the case before them, say: "It is the established doctrine of this court, that rights of miners, who had taken possession of the mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment

of a new one." Much other authority, in the decisions of courts, and in legislative acts, both of congress and of our own territory, might be cited upon this point. We are forced to conclude that the authority conferred by the act of 1861, incorporating the city of Denver, in respect to the control of the streets by the city, cannot be extended to invalidate the acquisition thereafter by the ditch proprietors of a right of way through lands which were then a part of the public domain, and prior to the acquisition of title thereto by the city, although streets had been previously laid out thereon and traveled.

Bearing upon the question of the relative rights and liabilities of the parties under discussion, it is not unimportant to notice that, from the testimony, it appears that the ditch proprietors, and those using the water therein, have never conceded the right of the city to require them to bridge the ditch, but have always resisted such demand; and that on the other hand, the city, from time to time, has bridged the streets mostly traveled where crossed by the ditch or raceway below the mills; that some of these bridges were built by the city many years ago, and have been maintained and kept in repair by the city ever since, thus apparently acquiescing in, if not acknowledging, the rights claimed by the defendants in error.

In consequence of the public interests involved, as well as the great value of the property that would be affected by the destruction of the ditch or the diversion of the water from the use of defendants in error, we have given this case that careful consideration which the respective rights and interests involved therein demand, and, upon such consideration of the whole case, we are convinced that the city is without right to require the defendants in error to bridge the ditch, as demanded of them, or to interfere with the flow and use of the water in said ditch, to the extent and for the purposes heretofore used and enjoyed, but that the duty and obligation

to construct such bridges, whenever and wherever the public necessity and convenience require, and to maintain and keep the same in repair, devolve upon the city. We are not to be understood as holding that the said ditch or the use thereof may not, at some future time, by reason of changed circumstances, become a nuisance, and liable to be abated as such; what we decide at present is, that, for the reasons stated herein, we perceive no error in the judgment and decree of the court below, and the same will be affirmed accordingly.

Affirmed.

BARNETT ET AL. V. KNIGHT ET AL.

1. Homestead exemption is entirely the creature of statute; but the statute is not in derogation of the common law, since at common law the creditor had no right to sell the debtor's land. Hence the rule that these statutory provisions are to be liberally construed, for the purpose of giving effect to the beneficent object in view, has been clearly established.
2. Under the Colorado statute, the homestead is not exempt until the owner elects to make it so, which election is evidenced by so indorsing upon the margin of the record of the deed. Such indorsement being made, the homestead, to the extent of \$2,000 in value, becomes exempt from execution or attachment upon any indebtedness arising after February 1, 1868. The householder is in ample time if he records this election before a lien attaches in favor of a creditor whose debt arose subsequent to that date.
3. As to exempt property, there are within the statute of frauds no creditors; so that the sale of a homestead is no fraud upon the rights of creditors of the grantor — the same not being subject to their debts. The exemption law and statute of frauds are *in pari materia*, and must be construed together.

Error to County Court of Arapahoe County.

ON May 4, A. D. 1881, Elizabeth J. Knight and Rebecca Moseby filed their complaint in Arapahoe county court, against William Barnett and Michael Spangler, averring "That July 29, 1874, Rachael A. Carr, mother of plaintiff

7	365
10	307
7	365
16	98
7	365
18	58
2a	371
7	365
20	367
7	365
17a	146

iffs, became the owner in fee of lots 29, 30, block 46, etc., by purchase from one Failing, who conveyed the same to her by deed, duly recorded, etc., and continued so until the same was sold by her to plaintiffs. During all this time the same was incumbered by a trust deed, to secure money borrowed by said Carr of one Hitchings; and at the time of his conveyance to plaintiffs there was still due \$350 of this sum.

"About September 15, 1879, said Carr sold and conveyed the premises to plaintiffs by deed, which was recorded October 1, A. D. 1879, in the office of the recorder of said county. Said deed recites a consideration of \$100; the real consideration was \$100 cash, an agreement to pay the balance due Hitchings, which plaintiffs afterwards caused to be paid—the amount being between \$300 and \$350,—with a further agreement that plaintiffs would assist in maintaining and supporting said Carr each year thereafter, which they have done; furnishing her not less than \$200 each year. At the time of said sale and conveyance said Carr was over seventy years, unable to earn money, possessed of only said real estate, then not exceeding \$800, and a small amount of household goods worth from \$200 to \$300, and of no other property; and said sale and conveyance was made, and by plaintiffs accepted, 'for the sole purpose of providing means to pay off said incumbrance, relieving the said Carr from her pecuniary embarrassments, and furnishing her with some additional assistance with respect to her living in the future, and for no other purpose and with no other purpose whatever.'

"On and before, and after said March 8, A. D. 1879, said Rachael was a householder and head of a family, residing upon said premises, occupying the same as a homestead; which real estate, with all improvements thereon, was worth on said 8th March, 1879, and before and after that, not more than \$800. The family aforesaid consisted of said Rachael and an invalid adult daughter, over twenty-

one years, but weak minded, and at times insane, who then, and before and afterwards, was kept and cared for, fed, clothed and provided for by her gratuitously and without compensation, as a dependent and helpless child and as a member of the family, which family consisted of these two, of which Rachael was the head; said Rachael being also owner of said premises.

“That said Rachael, on said 8th day of March, A. D. 1879, caused to be entered of record on the margin of her recorded title to said property, to wit, on margin of the record of said deed from Failing, the word ‘Homestead,’ as will appear by reference to said record.

“Thereafter said Rachael continued to own and occupy said real estate as a homestead, and to be a householder and head of a family until and including the day of the sale and conveyance to plaintiffs.

“That at that time, and on the said 8th day of March, A. D. 1879, said Rachael was indebted upon a promissory note, dated May 14, 1875, due fifteen months after date, for \$200, with interest from maturity at ten per cent. per annum, etc., etc., which was made payable to one Lewis, and by him transferred to defendant Barnett, October 23, 1880. Said Barnett commenced suit against said Carr, and levied an attachment upon said premises.

“That April 12, 1881, Barnett took judgment in said cause for \$282.70 and costs. Abstract of judgment filed April 16. Execution issued and levied April 18 upon said premises as the property of said Carr. That the defendant Spangler, as sheriff, etc., has advertised the said property for sale under said execution. That the certificate of levy aforesaid constitutes a cloud on the plaintiffs’ title.

“Prayer that the certificate of levy be canceled and set aside; that an injunction issue restraining defendants from proceeding to sell.”

Messrs. WELLS, SMITH and MACON, for plaintiffs in error.

Messrs. BENEDICT and PHELPS, for defendants in error.

HELM, J. The important assignment of error in this case is: "That the complaint doth not set forth facts sufficient to constitute a cause of action."

There is nothing in the record before us upon which we can predicate the conclusion that the conveyance from Mrs. Carr to defendants in error is void as to plaintiff in error, on the ground of intentional fraud. The uncontradicted averments of the complaint are our only source of information upon this subject; there is nothing in these from which we can justly draw the inference that she made the sale with intent to hinder, delay or defraud her creditors; neither is there anything to show that defendants in error, who were purchasers for a valuable consideration, had notice of such intent, even if it existed. Yet both of these facts must concur before the sale can be avoided on this account.

The question of fraud in fact may, therefore, be eliminated from this case; is there fraud in law of which plaintiff in error may take advantage? His counsel contend that there is; they assert: *First*, that as against the claim of plaintiff in error, the effort of Mrs. Carr to secure the benefit of the homestead exemption act was of no avail; for his demand was contracted before she caused the word "homestead" to be entered of record in compliance with law. And they argue, *secondly*, that since part of the consideration from defendants in error to her for the property was future assistance towards her support, the transaction was tainted with fraud in law *per se*, as to her existing creditors.

Other matters are discussed in the briefs, but we deem it unnecessary to extend our inquiry beyond these two questions. The first may be restated as follows: Can a

debtor avail himself of the bounty offered by our homestead exemption statute, as against an existing indebtedness which has not been reduced to judgment nor become a statutory lien upon the exempted premises, by attachment or otherwise, where allowing the exemption will leave him insolvent?

We are not aware of any direct adjudication of this precise question under similar statutes. It is by no means free from difficulty and doubt; that strong and logical arguments can be presented on both sides, is demonstrated by the briefs in this case.

Section 1631 of our General Statutes reads as follows: "Every householder in Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of \$2,000, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred after the first of February, in the year of our Lord one thousand eight hundred and sixty-eight." And section 1632 is as follows: "To entitle any person to the benefit of this act, he shall cause the word 'homestead' to be entered of record in the margin of his recorded title to the same, which marginal entry shall be signed by the owner making such entry, and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day upon which such marginal entry is so made."

We do not agree with counsel for plaintiff in error in their argument that the latter section was enacted for the purpose of giving notice, and securing protection, to those dealing with the householder and extending credit to him. If we did, the conclusion arrived at by them would inevitably follow; for, if the legislature prescribed the recording for the purpose of protecting parties with whom the claimant deals, the deduction is irresistible that it would not avail as to prior debts; more ingenuity than we possess would be required to demonstrate how

the creditor is benefited by a notice of this kind given him after he has extended the credit.

The key to a solution of the problem presented is found in the purpose and language of the entire act itself. Two governing principles underlie all homestead legislation:

First. The beneficent design of protecting the citizen householder and his family from the dangers and miseries of destitution consequent upon business reverses or upon calamities from other causes; and

Second. The sound public policy of securing the permanent habitation of the family, and cultivating the local interest, pride and affection of the individual, so essential to the stability and prosperity of a government.

Homestead exemption is entirely the creature of statute, but the statute is not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land (Thompson's Homesteads and Exemptions, sec. 2, and note); and the rule is fully established, that the statutory provisions are to be liberally construed for the purpose of giving effect to the principles above named.

Many of the states have extended this bounty to the householder without restriction or qualification, save that of visible occupancy and use; a few, like our own, have seen fit, for excellent reasons, to require of him, in addition to occupancy, an election as to whether or not he will accept the favor offered.

Section 1631, above mentioned, makes no reference to general indebtedness, except that its operation is confined to executions and attachments upon such liabilities as accrue after a certain date; it bestows upon the debtor the privilege of holding his homestead to the extent of \$2,000 in value, "*exempt from execution and attachment.*"

Section 1632 substantially declares that, until he records his acceptance of the bounty, his home, like his other

realty, shall be subject to "execution and attachment." There is nothing in either, or in any other provision of the act, which, in our judgment, justifies the conclusion that the legislature intended to declare that he must make this election before incurring the debt. That body simply say to him: "Prompted by a desire to protect and benefit you and your family, and also to advance the public welfare, we offer this bounty to you; but we do not force you to accept it, and if you do not record your acceptance before an attachment or execution lien is secured in favor of your creditor, such lien shall have preference."

By saying to him that he must record his notice of acceptance, the legislature did not intend to discriminate against the premises upon which he resides; they did not intend to give his creditor a right, lien or claim against the same, prior to such notice of acceptance, which did not extend to his other realty; he may, notwithstanding his debts, incumber, sell and dispose of his home in the same manner as any other lands to which he holds title; the *bona fide* purchaser or incumbrancer, for valuable consideration, takes the home or residence entirely free from claim or objection on the part of a mere general creditor; and this is true, even if such purchaser is aware, when he makes the purchase, of the vendor's indebtedness, and of his insolvent condition.

We think that, under our statute, the householder is in ample time if he records this election before a lien attaches in favor of his creditor.

It is very true that an act of the legislature conferring the privilege of a homestead exemption, as against debts incurred prior to its passage, is absolutely void; such an act is in clear violation of the inhibition of both federal and state constitutions against impairing the obligation of contracts. The right of the creditor, under the statutes in that behalf existing, to look to all of the debtor's realty for payment, is said to be a part of his remedy;

corded her notice claiming the same. There is nothing in the record advising us of any act on her part forfeiting this exemption privilege. At the time she sold to defendants in error, neither plaintiff in error nor his assignor could have taken the property under execution or attachment. The entire value being less than half the amount of the homestead allowance, the whole property was beyond the reach of an existing creditor; such a creditor had no interest therein, and having no interest, it cannot be said that he was wronged or injured by her sale. If the premises were beyond the reach of plaintiff in error in satisfaction of his debt, what mattered it to him whether she retained the title or sold or incumbered the property. Upon similar reasoning to this it is held that, "as to exempt property, there are, within the meaning of the statute of frauds, *no creditors*." The exemption law and statute of frauds "are *in pari materia*, and must be construed together." The former controls the latter as to the property specified, and in the disposition of exempted property there can be no fraud upon the creditors. Thompson on Homesteads and Exemptions, secs. 411, 412, and cases; Bump on Fraudulent Conveyances, p. 242, and cases cited; also pp. 211 and 215.

Of course when the value of the property exceeds the exemption allowance the creditor is interested; yet, in such a case, it by no means follows that if a conveyance were set aside for fraud, at the suit of creditors, the debtor would be estopped from still claiming and holding the exemption privilege acquired before the fraudulent transfer. Thompson on Homesteads and Exemptions, sec. 408 and cases cited.

Examination thereof demonstrates that the spirit as well as the letter of our entire homestead act is in harmony with the views we have adopted upon both of the foregoing questions.

Section 1634 gives the benefit of the homestead to a surviving widow, husband or minor children; section 1637

provides for cases where the premises exceed in value the exemption allowance of \$2,000; the creditor may sell the same under his execution, but he is required to pay the debtor this amount from the proceeds; he is only entitled to apply to the discharge of his demand the surplus, after paying all costs and \$2,000 to the exemption claimant; if there be not enough proceeds to do this, he must make up the deficiency from his private funds. Section 1638 authorizes the debtor to sell his homestead and invest the proceeds therefrom in another; the new homestead so acquired is exempt from execution or attachment for debts existing before the sale; the *bona fide* purchaser for valuable consideration, of the old homestead premises, takes the same entirely free from liens on account of judgments or other claims against his grantor existing at the time of the sale.

This section does away with every doubt as to the debtor's right to dispose of his homestead; the last clause thereof puts at rest all uncertainty as to the effect of a judgment lien upon the homestead. On the latter subject counsel cite two lines of decisions, which have been rendered in the absence of such a statutory provision: *First*, those holding that no judgment lien attaches to the homestead; and *second*, those which declare that such lien does attach, but is simply held in abeyance till sale of the premises or forfeiture of the right. Important consequences flow from the distinction, which it is not necessary, in view of our statute, for us to state or consider. But the former view is sustained by the weight of authority and the better reason; and it has been expressly recognized by legislation in at least two of the states, where the latter was first announced by the supreme court. See Thompson, sec. 390 *et seq.*, and cases cited.

We think plaintiff in error is not in position to claim, in this case, the benefit of the general doctrine declaring a conveyance fraudulent and void as to creditors, which

is made partially in consideration of future support to the insolvent grantor.

The complaint states facts sufficient to constitute a cause of action. The judgment will be affirmed.

Affirmed.

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THE PEOPLE EX REL. BERNARD ET AL. V. CHEESEMAN
ET AL.

1. Articles of incorporation which declare an intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads, in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," held, not to indicate an attempt to create an ordinary railroad company, under sec. 333 *et seq.*, General Statutes.
2. In this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority.
3. The failure of the notary public before whom articles of incorporation are acknowledged, to certify that the parties acknowledging the same are personally known to him, is not fatal. A certificate that the persons whose names are signed to the articles (giving them) appeared before the notary and acknowledged the same, is sufficient. Neither the provisions of the statute as to the acknowledgment of deeds, nor the reasons therefor, apply to the acknowledgment of articles of incorporation.

Error to District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. W. A. HARDENBROOK and R. J. PAGE, for plaintiffs in error.

Mr. GEO. M. DUNN, Messrs. TELLER and ORAHOD and Messrs. B. M. and C. J. HUGHES, for defendants in error.

HELM, J. Relators, in the name of the people, seek, by an action in the nature of a *quo warranto*, to directly challenge the corporate existence of "The Union Depot and Railroad Company." Their theory is, that respondents, under that name, wrongfully usurped the privileges and franchises of a corporation; that respondents' attempted organization of the company was void *ab initio*, by reason of a failure to comply with the precedent requirements of our general incorporation act.

The action is brought under chapter 28 of the code of 1883. It is somewhat doubtful if relators are in position to maintain the same in the name of the people or otherwise, giving the code provisions the interpretation most favorable to them. But we prefer to base our determination of this proceeding in error upon other grounds.

Some doubt seems to exist in the minds of counsel as to the purposes for which the corporation was attempted to be organized; this uncertainty grows out of the language used in the articles of incorporation. Respondents therein declare their intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers."

Does this language indicate an attempt to create an ordinary railroad company under our laws? (Sec. 333 *et seq.*, General Statutes.) We think not.

The primary and principal design evidently was to build and maintain a union depot. Various lines of railroad extended to the city; they came in from different directions and discharged freight and passengers at dif-

ferent points; to successfully "maintain" a union depot, and thereby accomplish the purpose of the enterprise, it was of course necessary to connect the same with the several termini of the roads within the city. Incidental, therefore, to the main adventure was the construction and keeping in repair of lines of track to make these connections. Had the articles of incorporation announced a purpose to build and maintain a union depot, and connect the same by lines of track with the different railroads centering in Denver, the same intention would, in our judgment, have been expressed, and the same end attained. The language of the articles expressly excludes the idea that the Union Depot Company intended to *operate* the "lines of railroad" they constructed; for these lines were to be built and maintained "for the accommodation and use of the different railroads," etc. It is safe to say that the legislature, in the portion of the incorporation act above mentioned, were not providing for such incidental aids to another enterprise as this. And it is also a fair conclusion from the language used, and the evident purpose expressed in the articles of incorporation, that respondents had no intention of engaging in the business of constructing or operating a railroad under said statutes.

It is true that the word railroad is used in the corporate name, and the term of existence is fixed at fifty years; it is also true that by the substituted articles of incorporation the number of incorporators was increased from four to five. These facts would cast some doubt upon the subject if there was room for uncertainty. But, as above indicated, we think there is no ground for reasonable doubt as to what respondents' purposes really were; and it is unnecessary for us to speculate upon their reasons for preparing the articles of incorporation in the manner they did.

The conclusion that they were not attempting to engage in a railroad enterprise disposes of many of the ob-

jections presented by relators; it also greatly simplifies our consideration of the remaining questions.

An attempt was made by respondents to organize an ordinary private corporation for a lawful purpose, under our statutes authorizing the same; did they succeed?

As already suggested, the grounds of attack relied upon in this case are errors in the attempt to comply with the specific requirements of the statute in creating the corporation. No effort is made to have a forfeiture of its franchises declared on account of acts or omissions occurring *subsequent* to its organization.

We have no doubt but that in this state a *substantial* compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation; and that a failure to comply therewith, in any material particular, is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority.

Twelve different alleged defects are named, and discussed at length in the briefs; many of these, however, are already disposed of, and we only deem it important to consider two of the remainder.

First. Was the fact that the articles of incorporation provide for an existence of fifty years fatal?

Section 238 of the General Statutes requires that these articles shall state, among other things, "the term of existence, not to exceed twenty years."

The defect here suggested is not an omission to insert something required. Respondents comply with the statute by declaring the term of existence; as to the length of this term, they ask more than the law allows; in the face of a restriction to twenty years, they assume the right to act for fifty. This statutory provision as to time may, we think, properly be regarded as a limitation. And we are of opinion that the irregularity is not such a non-compliance with law as operates to prevent the corporation from coming into existence. It cannot, with-

out renewal, live for fifty years, but, so far as this objection is concerned, it may exercise the rights and privileges of a corporation, in carrying on the business intended, for the period of twenty years.

Second. Was there a fatal defect in the certificate of acknowledgment of the articles of incorporation?

This certificate is as follows, to wit:

"STATE OF COLORADO, *Arapahoe County* — ss.

"I, William B. Tebbets, a notary public within and for the county of Arapahoe and state of Colorado, do hereby certify that on the 24th day of November, A. D. 1879, personally appeared before me the persons whose names are signed to the foregoing articles of association, namely: Walter S. Cheeseman, Bela M. Hughes, D. C. Dodge, A. A. Egbert and J. F. Welborn, and they each of them acknowledged that they had signed the foregoing articles of association for the purposes therein set forth. In testimony whereof I have hereunto set my hand and affixed my official seal this the day and year aforesaid.

WILLIAM B. TEBBETTS,

[SEAL]

'Notary Public.'

The specific objection to this certificate is, that it is not stated therein that "the individuals who acknowledged the same were personally known to the officer who took the acknowledgment, or proven to him to be the persons who executed the certificate."

Were this omission in the certificate of an acknowledgment to a deed conveying real estate, we might be constrained to hold such certificate defective; such is the conclusion reached under a statute identical with ours, section 212, which provides for the acknowledgment of instruments relating to realty. *Shepherd v. Coniel*, 19 Ill. 319.

But the statute under which the certificate of acknowledgment to these articles of incorporation was made contains no such specific requirement as said section 212; it simply declares that the acknowledgment shall be

"before some officer authorized to take the acknowledgment of deeds;" the declaration that the same officer shall officiate does not, necessarily, imply that he must certify to precisely the same matters in both instances.

The provision requiring the officer to state that the individual subscribing, and the one acknowledging, are personally known by him to be identical, was inserted for the purpose of preventing one individual from personating another in the execution of instruments relating to real estate.

As will be observed, the notary public certifies that the persons whose names are signed to the articles of incorporation under consideration personally appeared before him. In early times this would have been ample in the certificate to an acknowledgment of a deed to realty; and we are satisfied that it is a sufficient compliance with the incorporation statute upon the subject. The judgment of the district court will be affirmed.

Affirmed.

RANKIN V. THOMPSON ET AL.

When there is no substantial conflict in the evidence as to a material fact, and the jury find contrary thereto, it will be assumed that they misunderstood the evidence, or misapprehended its scope and effect. In such case the verdict should be set aside and a new trial granted.

Appeal from District Court of Fremont County.

THE facts are stated in the opinion.

Messrs. THATCHER and GAST, for appellant.

Mr. J. M. WALDRON and Mr. J. D. FREEMAN, for appellees.

HELM, J. Appellees were sub-contractors under appellant in grading a portion of the Gunnison extension of

the Denver & Rio Grande Railway. No particular amount of grading was stipulated to be done by them; they were to do as much as they could. The construction work on this extension was divided into sections one mile each in length. Appellees commenced grading upon section 274, which they finished; then proceeding to 275, they did about one-quarter of the work, and passed to 276; leaving the latter in an unfinished condition, they advanced their force to 277; after doing a small part of the work on 277 they returned to 276, and ultimately completed the grading of that section.

In the meantime the track-layers were approaching, and the extension company had given orders to appellant to have the gaps left by appellees upon these sections immediately filled up; appellant gave notice to appellees in accordance with these orders; the latter failing to comply as quickly as the urgency of the case required, appellant put forces of men to work and completed the sections.

There is practically no dispute as to the actual amount of grading done by appellees, or the sum paid them therefor, and the balance remaining due. But appellant contended that appellees were bound to finish each section before leaving it; that their failure to do so was a violation of their contract with him; that by reason of such failure the necessity arose for his filling the gaps left; that in the sudden removal of camps, the transfer of large bodies of men, the performance of the labor and otherwise in doing this work, he was compelled necessarily to incur great expense; and that such necessary and reasonable expense, added to the amount already advanced to appellees, exceeded what he would have paid them, under the contract, for grading the four sections, in the sum of \$1,177.70. For this amount appellant, in his answer, demands judgment by way of counterclaim.

The contract was verbal, and appellees deny that they

were bound thereby to complete each section before passing to the next, leaving no gaps unfinished.

The main question of fact presented to the jury related to the terms of the agreement in this respect. Under the evidence in the record, it appears that the jury must have resolved this question of fact against appellant.

If the record disclosed a substantial conflict of testimony upon this feature of the contract, we would not presume to interfere with the findings of the jury thereon, although they adopted the sworn declarations of one witness as against those of two.

Appellant swears positively that, under the agreement, appellees were to finish the work on each section before they passed to another, and were to leave no gaps; his statements are corroborated by the testimony of Clark, and also, in our judgment, by that of Thompson himself; for Thompson says that he did not understand that appellees were permitted to work here and there, leaving gaps between. The rest of Thompson's testimony upon this subject in no way conflicts with appellant's view of the contract. The facts that no certain amount of work was contracted for, and that appellees were to begin and do what they could with their "outfit," are not inconsistent with the proposition that they were bound to complete each section before leaving it. Neither is his denial that a certain conversation took place relative thereto, a declaration that the contract did not contain this provision.

Here, then, was a question of fact constituting a material issue, upon which there is no substantial conflict in the testimony; as to which, on the contrary, the testimony of both sides is in harmony. We think the jury must have misunderstood this evidence, or misapprehended its scope and effect.

The record discloses nothing which can fairly be construed as a waiver on the part of appellant of a breach of the contract in this respect. Upon a retrial of the

cause it may be made to appear that such a waiver took place; or under amended pleadings, if amendment thereof be allowed, matters in avoidance may perhaps be presented.

But we are satisfied that, for the erroneous finding of the jury, this judgment should be reversed; it is unnecessary to consider the remaining assignments of error.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

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GARVEY'S CASE.

1. *Habeas corpus* will lie when the petitioner is confined under the judgment of a court, to enter which the court had not jurisdiction — as in case of a judgment not based on a valid verdict of conviction.
2. Certain crimes, including murder, are arranged in grades, one above another, and each higher offense or grade of an offense contains all that is embraced in the one next lower, and something more. It is not necessary that an indictment for any offense shall specify the name of the offense, provided it is in all other respects sufficient. In this class of crimes, whatever the offense alleged in the indictment, there may be a conviction of any other if within the words of the allegation; — an indictment for murder charges also all the lower grades of felonious homicide, and a conviction for manslaughter may be had upon it.
3. An indictment for murder was found by the grand jury. Subsequently an act of the legislature was passed without a saving clause, which rendered it illegal to convict the accused of the crime of murder, but did not affect the law as to the punishment for manslaughter. *Held*, that the accused, under that indictment, might be tried for the latter offense.
4. In such case, the fact that the accused has been tried under said indictment, convicted of murder, and judgment pronounced upon the verdict, which judgment was reversed because of error in entering the same — the law having been so modified as to forbid the judgment, — will not warrant his discharge on the 'ground of former jeopardy when subsequently tried for manslaughter on the same indictment.
5. The verdict is the foundation of the judgment, and when the latter is reversed because the law did not authorize the former, both are

set aside and are of no effect;— judgment for murder being reversed and the cause remanded for further proceedings, the court cannot, upon such verdict for murder, enter judgment for manslaughter without a retrial of the cause. One so convicted may be released from the penitentiary on *habeas corpus*, and remanded to the custody of the sheriff to await trial.

In Supreme Court.

APPLICATION for release from penitentiary on *habeas corpus*.

Messrs. WELLS, SMITH and MACON, for petitioner.

Attorney-General D. F. URMY, for the people.

BECK, C. J. The petitioner was indicted for the murder of one George Wolf, alleged to have been perpetrated on the 23d day of May, 1880. The indictment was found by the grand jury on the 15th day of March, 1881, on which he was tried at the special November term of the district court of Arapahoe county, 1881, found "guilty of murder as charged in the indictment," and sentenced to imprisonment for life in the state penitentiary.

A writ of error to the judgment was prosecuted to this court, and at the April term, 1883, we reversed the judgment and remanded the cause, for the reason that, after the commission of the offense, the legislature had so amended the statute concerning murder as to alter the situation of the prisoner to his disadvantage, without a saving clause as to the repealed provisions, thus making the law *ex post facto* as to the case of the petitioner.

The petition is demurred to by the attorney-general on behalf of the people, and it is stipulated by counsel representing the respective parties, that the cause be heard upon this demurrer, and that the record upon the writ of error of *Garvey* (the petitioner) *v. The People*, recently heard and determined in this court, together with the judgment of the district court of Arapahoe county, subsequently rendered, denying the motion to quash the

indictment, and entering judgment upon the former conviction, be considered as a part of the present petition for writ of *habeas corpus*.

Upon the return of the record in the district court, the petitioner moved to quash the indictment, upon the ground that it was insufficient in law, as appeared from the judgment of reversal. The petition alleges that the court denied the motion to quash, and gave judgment on the same verdict, without any further trial of the prisoner, that he be confined in the state penitentiary for the term of eight years. Upon this judgment the prisoner was committed to the penitentiary, where he still remains in confinement, and to be released from which he has sued out, from this court, the present writ of *habeas corpus*.

The judgment complained of is a judgment for manslaughter.

The grounds of the present application appear to be:

First. That the condition of the law applicable to the case of the prisoner, at and since the time of his trial for murder, has been such that he could not lawfully be tried for any offense charged in the indictment in question.

Second. That the action of the district court in pronouncing judgment for manslaughter without a trial by jury was without jurisdiction, and therefore null and void.

Upon the first proposition, it is contended that the repeal of the provisions of the law of homicide, above alluded to, quashed the indictment, or left it in the same condition it would have been if no law authorizing an indictment for murder had ever existed. That if this be true, there could be no record in the district court upon which punishment for any offense charged in the quashed indictment could be inflicted. The repeal of the statutory provisions had the same effect upon the indictment as if a demurrer thereto had been sustained on the

ground that it charged no crime. There could not be a conviction of manslaughter, because it was quashed *in toto* and not in part only. A demurrer, it is argued, would not have been sustained as to the charge of murder, and overruled as to the charge of manslaughter involved in the allegations constituting murder, but the indictment would have been quashed and the prisoner discharged.

Much prominence is given the proposition that an indictment or any pleading, under a statute which is repealed after the filing thereof, is, for all purposes, absolutely null and void.

The act amending the Criminal Code was approved March 1, 1881; and while it did not go into effect until after the filing of the indictment, on the 15th day of March, 1881, still the amendment of the statute did not wholly repeal or annul the indictment. The law of homicide was not repealed. Two sections concerning the punishment of murder were repealed; but no change was made in the provisions relating to manslaughter. This is but a lower grade of the same offense, or a constituent part of it, and necessarily committed in the perpetration of a murder. It is held, in this class of cases, that a count, properly framed, for the higher grade or offense, contains all the essential elements of a count for the minor offense. In illustration of this principle, it was said in *Commonwealth v. Harney*, 10 Met. 425, that an indictment for murder or manslaughter contains a full and technical charge of an assault and battery.

But it is further contended that the effect of the legislation referred to was to *abolish* the offense of murder, so far as the petitioner is concerned; and this being done, he could not be convicted of manslaughter, upon this indictment; for while manslaughter is included in every indictment for murder, there was here no indictment for murder; and it cannot be said that one crime contains another when there is no containing crime, or that an indict-

ment for murder includes manslaughter, when there is no such offense as murder.

It would seem to be an extravagant proposition, that, as to the petitioner, there is no such offense as murder. As stated in *Garvey v. The People, supra*, there remained unrepealed of the law of homicide, in addition to the provisions relating to manslaughter and its punishment, the sections defining the crime of murder, providing the form of indictment, and imposing the death penalty upon such as should be convicted. True, the change made was such that the petitioner could not be lawfully convicted of murder, but there existed no space of time wherein the crime of murder was not an indictable statutory offense. The statutory definition of the crime of murder was substantially the common law definition as given by Blackstone and Coke. 4 Bl. Com. *195. The same was true of the form of the indictment under the statute. It was substantially the common law form.

The statutory definition of manslaughter was the same as defined at common law. 4 Bl. Com. *191. The law of manslaughter was amended in 1883, but there was a saving clause as to all cases pending, so that the amendment does not affect the petitioner. Now, counsel for petitioner say: "It is admitted that in every valid indictment for murder, voluntary manslaughter is also contained; but not in an indictment that has been quashed, repealed or rendered void as to the murder therein charged."

But the indictment, as a pleading, has never been quashed, repealed, or rendered void, either by legislative action, or by the order of any court. The fact that circumstances have transpired since the offense was committed, which render the charge of murder therein contained inapplicable to the case of the petitioner, does not necessarily discharge him of manslaughter, which is a lower grade of the same offense. His liability to answer for the latter does not depend alone on the principle that

it is an included offense, but that it is charged in the indictment as well.

We apprehend that the true tests, in such a case, by which to determine the validity of the indictment are: Is the offense for which the conviction is sought included in the crime charged in the indictment; and if so, is it sufficiently alleged?

Our constitution provides that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him, which is nothing more than was required by the rules of the common law. We have seen that the statutory definitions of murder and manslaughter, as the same remained unrepealed after the legislation of 1881, were synonymous with the common law definitions of the same offenses; and since the statute requires all trials to be conducted according to the course of the common law, except where another mode is pointed out in the Criminal Code, we may safely test the sufficiency of this indictment by its principles.

At common law, the words "murder" and "manslaughter" appear to have been terms employed to designate different grades of the same offense, viz.: the felonious killing of a human being. All that distinguished one grade from the other were the words "malice aforethought." Bishop, Stat. Cr. sec. 468.

In his work on Criminal Procedure, vol. 2, sec. 576, Mr. Bishop says: "Whether murder and manslaughter are to be called two crimes, or one, is matter only of words, not of ideas."

Certain crimes, including murder, were arranged in grades, one above another, and each higher offense, or grade of an offense, was said to contain all that was embraced in the one next lower, and something more. It was not necessary that the indictment for any offense should specify the name of the offense, provided it was in other respects sufficient, and in this class of crimes,

whatever the offense alleged in the indictment, there might be a conviction of any other, if within the words of the allegation.

Mr. Bishop says the indictment for the higher form of the offense would almost necessarily be in such language as to include the lower; and, referring to the subject of murder, says: "We have already considered what, in general terms, is the distinction between the indictment for murder and for manslaughter; the former merely requiring some allegations added, which are not in the latter. In other words, the indictment for murder, being founded on the statute which divided felonious homicide into the two degrees of murder and manslaughter, must contain those statutory terms which distinguished the higher from the lower." 2 Bish. Crim. Proc. secs. 576, 540; 1 Bish. Crim. Proc. secs. 416, 417, 418; 1 Bish. Crim. Law, sec. 798.

Mr. Wharton illustrates it as follows: "Thus, if A. be charged with feloniously killing B., of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprised of the nature of it; the verdict enables the court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts." 1 Wharton, Crim. Law, sec. 627.

In *McPherson v. The State*, 29 Ark. 225, 233, the court say: "An indictment for murder charges, also, all the lower grades of felonious homicide, and a conviction for manslaughter may be had upon it."

No objection has been raised as to the form of the indictment in the present case, so far as the charge of murder is concerned, and we feel warranted in saying, that if any indictment, in the common law form, contains all the allegations essential to the charge of manslaughter, then the indictment in this case is sufficient to

sustain a conviction of that offense. If the proposition of petitioner's counsel was to be conceded, that the amendment of the statute abolished the crime of murder so far as the prisoner is concerned, the force of the proposition is expended when it is declared that he cannot be lawfully convicted of that grade of crime. But murder, as a criminal offense, was not abolished, and being primarily charged in the indictment, and the indictment being sufficient in form, it follows, under the authorities cited, that the offense of manslaughter is substantially charged therein.

In so far as the terms descriptive of the offense, in the present case, exceed the description of manslaughter, they do not vitiate the indictment, but may be treated as surplusage. 1 Bish. Crim. Proc. secs. 478, 479.

It was held in *Reed v. The State*, 8 Ind. 200, that in an indictment for a homicide, charging murder, but defective as to that grade of crime, the word "murder" might be rejected as surplusage, and the prisoner put upon his trial for manslaughter. The same rule was announced in *Dias v. The State*, 7 Blackf. 20, respecting the words "with malice aforethought."

The indictment in the case at bar, though not defective in form as to the higher offense or grade of the offense charged, charges an existing statutory grade of homicide, of which the petitioner cannot be convicted.

But there is no force in the suggestion that, if put upon trial for manslaughter, and the evidence should disclose that the killing was perpetrated with malice aforethought, there could be no conviction of the minor offense. This point was expressly adjudged in *Commonwealth v. McPike*, 3 Cush. 181, wherein it was held that it is no defense to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder. Also, in *Barnett v. The People*, 54 Ill. 325, in reference to the subsequent trial of the pris-

oner, who had been convicted of manslaughter upon an indictment for murder, the court say: "He could not be convicted on this trial for murder, but, a new trial having been granted on the conviction for manslaughter, he might be, and was, properly tried again for the latter named crime. And, although the proof might show that the crime was perpetrated deliberately and with malice, still, after such acquittal, the conviction could only be for the lower grade of crime."

The foregoing conclusions and authorities sufficiently answer the propositions urged in behalf of the petitioner, that, had a demurrer been filed to this indictment, it must have been quashed *in toto*; that an original trial for manslaughter could not be had thereon, and that if the prisoner had been put to his trial for the minor offense, and the evidence disclosed a case of murder, he must have been discharged.

The proposition that the prisoner has been once in jeopardy, and, for that reason, could not have been put upon his trial for manslaughter, is equally fallacious. Counsel say, if the indictment would support a conviction for manslaughter at all, it would have done so in the first instance, and, not being convicted of this crime on the first trial, he cannot be put in jeopardy of it again. If the prisoner had been wholly acquitted there would be force in this assertion, but the fallacy of the reasoning is exposed by the authority cited in its support, viz.: 1 Wharton's Criminal Law, sec. 551.

Mr. Wharton says: "The rule is that if the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been legally adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence were adduced at the trial of the first indictment or not."

The whole section proceeds upon the supposition that the prisoner has been *acquitted* on the first indictment.

The fact here is otherwise. The prisoner was *convicted*, and the judgment was reversed because the conviction was illegal.

The only other instance mentioned in this section, as constituting a bar to further proceedings, is where there has been a conviction on a defective indictment, followed by judgment and a performance of the sentence. This, likewise, is inapplicable to the case of the petitioner.

The cases of *Shepherd v. The People*, 25 N. Y. 406, and the *Hartung* case, are mainly relied upon in support of the position assumed, that the petitioner cannot be subjected to another trial, but must be unconditionally discharged upon this writ. We agree with the attorney-general and assistant counsel for the state, that the *Hartung* case may be clearly distinguished from the case at bar. Every step in the *Hartung* case, from its inception, is shown to have been regular and legal. There was no error in the indictment, verdict or judgment. The conviction and judgment were, in all respects, valid when had and pronounced. The judgment was reversed because the legislature had subsequently enacted a statute which forbade the execution of the death sentence that had been pronounced. The reversal of the judgment, therefore, was not based upon error in any of the proceedings in court, but upon matter wholly *dehors* the record. When it is considered that the prisoner might have been executed before the repeal of the law, the cause of the reversal, and which may be termed an accidental circumstance, it is but rational to say that he was once in jeopardy.

But it is asserted that the *Hartung* case was not so strong for an absolute discharge of the accused as this case, for the reason that all the proceedings there were legal, whereas every step in this case was illegal, except the indictment, and that, say counsel, was valid when found, but, by the repeal of the law, it became mere waste paper.

These conclusions are evidently based on false premises. As before stated, the indictment was not invalidated, as a pleading, by the repeal of the law. And if the proceedings attending the trial were so grossly illegal, as alleged, how, upon reversal of the judgment, they would constitute a bar to another trial, especially in view of the provisions of our constitution, we do not perceive. The admission of the facts assumed would seem to conclusively establish the converse of the proposition.

Sec. 18, art. 2, of the constitution, provides as follows:
 * * * "Nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

This judgment was reversed for errors of law, which consisted in the trial, conviction and sentence of the petitioner for murder, whereas his offense under the law, applicable to his case at the time of his indictment and conviction, was manslaughter.

The case of *Shepherd v. The People, supra*, does not seem to have involved similar constitutional provisions.

It now only remains to inquire whether the petitioner can be released from the penitentiary upon the present writ.

This inquiry is, we think, answered by divisions 1 and 7, section 3, of the Habeas Corpus Act, General Statutes, p. 532.

The statute provides that if it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes: "*First*. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, scene or person."

* * * * *

"*Seventh*. Where there is no general law, nor any judgment, order or decree of a court, to authorize the

process, if in a civil suit, nor any conviction, if in a criminal proceeding."

We are of opinion that the court below exceeded the limit of its jurisdiction, in this, that it pronounced the judgment of imprisonment in the penitentiary without any conviction of the prisoner.

The result of the former trial had been wholly annulled by this court, and the cause had been remanded for further proceedings.

It was thereafter, according to the foregoing views, pending in the district court for trial upon the charge of manslaughter.

The judgment having been reversed without any reservation, and the cause remanded, the verdict of the jury fell with the judgment, and it would seem that no more authority then remained for pronouncing judgment upon such verdict, without submitting the case to another jury, than existed in the first instance to pronounce judgment upon the indictment without a trial of the accused.

It was held in *People ex rel. v. Whitson*, 74 Ill. 20, that if the judgment upon which the prisoner is held in custody is merely erroneous, and subject to be reversed on writ of error, he will not be discharged upon writ of *habeas corpus*. But if the court had no power or jurisdiction to render such judgment, the prisoner should be discharged.

Our conclusion is that the imprisonment, under the judgment complained of, is illegal, for the reason that the judgment of the district court is not merely erroneous, but void, and for that reason, and because of the non-observance of the forms of law in the proceedings of the district court, the petitioner must be discharged from the penitentiary. But it appearing to this court that he stands legally indicted of a felony, the order will be that the petitioner be discharged from the penitentiary, and that he be remanded to the custody of the sheriff of Arapahoe county.

It is further ordered that said sheriff admit the petitioner to bail upon his executing a bond in the sum of \$5,000, with sufficient sureties, and in form and conditioned as required by the Habeas Corpus Act, said bond to be approved by the sheriff of Arapahoe county.

WELLS V. FRANCIS ET AL.

7	396
11	134
7	396
16a	409
7	396
c20a	64

1. In equity the rule is, that all persons materially interested in the result should be made parties to the suit.
2. The relation of the parties to a title bond is that of mortgagor and mortgagee; the action for a vendor's lien is analogous to the foreclosure of a mortgage; and the rule that a person claiming adversely to the title mortgaged need not be made a party applies to the former as well as the latter action. A strong analogy also exists between the action for a vendor's lien and a suit for specific performance, but in the latter the above rule as to adverse claimants likewise prevails.
3. If it does not appear on the face of a contract, or otherwise, that the trustees act as agents, or in a fiduciary capacity, it is unnecessary to go beyond the terms of the contract.
4. Adverse claimants of title to realty cannot resist the suit of one joint tenant therefor, on the ground that his co-tenants are not asserting their interests in the same action.
5. The general rule that a judgment or decree is inadmissible as evidence, except in suits between parties or privies thereto, is not inflexible; it is sometimes admissible between others as an introductory fact to an important link in a chain of title relied upon.
6. The action for a vendor's lien may be maintained against one holding actual possession under a title bond of a part of the public domain, with extensive and valuable improvements thereon.
7. A patent which is not void on its face for fraud or irregularity in procuring the same can only be impeached therefor in a direct proceeding to set it aside.
8. Title procured to that which may properly be termed a trust estate, by the trustee, for his own advantage, and against the interest, and without the consent, of his beneficiary, will be declared in equity to be held in trust for the latter. And one who, with full knowledge of the situation, colludes with the trustee in procuring such adverse title is in no better position than the trustee himself.

9. An agreement signed by but one party thereto, without any present consideration passing, is a naked promise, and, at least until part performance, cannot be enforced by or against either party.
10. It is the duty of a court of equity to render exact justice between the parties before it in each particular case, so far as such a course is consistent with that certainty in legal rules and security of legal rights which must form the basis of all stable jurisprudence. And a court of equity will refuse its aid to give the plaintiff what the law would give him if the courts of common law had jurisdiction, without imposing upon him conditions relating to the subject-matter in controversy which the court considers he ought to comply with, although the subject of the condition is one the court would not otherwise enforce.

Appeal from District Court of Clear Creek County.

APPELLANT filed complaint in Clear Creek district court against appellees, averring:

That September 6, 1870, George Way was the owner of premises then situate in the public domain, to wit, a certain mill site and water-power with the mill building, etc., and on or about the same day executed to the Franklin Silver Mining Company a title bond, conditioned to convey the same; that about February 1, A. D. 1871, the Franklin Company assigned the same to one McFarland; that about August 25, 1871, Way, in lieu of said bond, executed another like bond, conditioned to convey the premises to McFarland on or before September 6, 1872, on payment of certain moneys to Way, and other moneys, parcel of the purchase money, to plaintiff; December 6, 1872, McFarland assigned said bond to defendant Francis, and Francis, in consideration thereof, promised to pay plaintiff the moneys by McFarland payable to him, and Way, in consideration of the premises, and in substitution for the former bond, executed to Francis a title bond, conditioned to convey the premises to him; at the time of the execution of the first bond, the Franklin Company was admitted by Way to possession, and afterwards transferred such possession to McFarland, who transferred possession of said premises to

said Francis about December 6, 1872; that Way, and those from whom he derived title, had, before the execution of the first bond, erected upon the premises mill buildings and other buildings, and expended \$40,000 or thereabouts therein; that on the 8th day of September, A. D. 1873, plaintiff was entitled to a lien on the premises for the moneys to him due and owing, and on that same day filed in the district court of Clear Creek county his bill against said Francis and others, to enforce said lien; that said Francis was then, and still is, a non-resident; that due notice was given; that said Francis appeared and answered; that plaintiff proceeded with all due diligence in the prosecution of said suit; that at June term, 1879, decree was given establishing the lien for said moneys, \$2,950, and it was ordered, adjudged and decreed that said Francis pay, etc., and in default, sale, etc. Sheriff to execute the deed.

Sale made October 28, 1879, and premises struck off to plaintiff and deed executed.

At the time of exhibiting said bill, the premises were in the mineral lands of the public domain, and were then occupied by said Francis as a mill site, with a mill for the reduction of gold and silver-bearing ores.

That both said McFarland and Francis were always non-residents, and during all the time of the occupancy and possession of said premises by them respectively, they were represented by defendants Andrew W. Myers and Augustus Blackman, until some time in summer of 1873, and they, as agents, were in charge of said mill; some time in summer of 1873, said Andrew W. was removed, and said Augustus Blackman became, and for a long time thereafter, and until the 1st January, 1879, or thereabouts, was the sole agent of said Francis in the possession of said premises; that in 1872, by extension of the government surveys, it was ascertained that said mill site was on S. W. $\frac{1}{4}$ of sec. 32, T. 3 S., R. 72 W., and at some time afterwards, Jonas Myers, a brother of

said Andrew W., and then residing at said mill as one of the servants of said Francis, by procurement of said Andrew, applied in United States land office to enter said lands, and afterwards said Jonas was permitted to enter said lands of the United States,—patent issued June 20, 1875; that though said Francis was then absent from the territory, and said Andrew W. and said Augustus were the agents of said Francis, occupying said premises under him, receiving his wages, and in duty bound to protect the title, neither of them informed said Francis of the entry of said land by said Jonas, but concealed the fact, and the fact of his application, from said Francis; that said Francis, about June, 1873, discovered that entry of said lands had been made by said Jonas, and said Jonas thereupon, on demand of said Francis, entered into a written acknowledgment that said Jonas held the title in trust for said Francis, and covenanted to convey said title, and the whole of said quarter section, to said Francis, free of all incumbrance, on payment of \$300, on or before the expiration of thirty days from date of securing government title; that said Francis, being a citizen of the United States, and said mill, etc., being situate upon non-mineral lands in the mining districts of the public domain, said Francis was entitled at the date last aforesaid to enter and purchase said mill site, etc., from the government, subject to the right of plaintiff; that said Jonas was never a settler or the owner of any improvements upon said quarter section, and never cultivated any part thereof; and the entry made by said Jonas was procured by the fraudulent combination of said Andrew, Harriet, Augustus, Henry and Joseph, and by imposition and deceit by them practiced upon the officers of said land office, whereby said officers were kept in ignorance of the right of said Francis and plaintiff, and were led to believe that said Jonas was an actual settler, and entitled to purchase the same; that said Jonas hath not conveyed any part of said lands to said

Francis, but, intending to defraud said Francis and this plaintiff, said Jonas, on October 24, 1874, conveyed one-fourteenth of said quarter section to said Henry Wilson, five-fourteenths to said Blackman, and one and one-half fourteenths to defendant Lehman.

At the time of said several conveyances, all said defendants had notice of the rights of said Francis and plaintiff in the premises.

That until about October 28, last past, plaintiff had no notice or information of the entry of said lands, or of said several conveyances and agreements, or either, but believed that said Jonas had executed proper conveyance to said Francis.

That defendant Parsons claims to have a judgment lien; avers that it was recovered fraudulently, by connivance of Blackman, to cloud the title, etc. That the conveyances of said Jonas to said Wilson, Blackman and Lehman were executed without consideration; that Harriet Myers claims some interest; that she is the wife of Andrew, and whatever interest she hath was obtained with full knowledge of the rights of plaintiff and said Francis, and without consideration.

Prayer that defendant be restrained from selling, and decreed to hold the title derived from the United States in and to said mill site, etc., in trust for plaintiff, and to convey, etc.

Answer of Blackman:

Admits the title and possession of Way, the bond executed by Way to the Franklin Company, the assignment of it to McFarland, the execution of the second bond by Way to McFarland; denies the alleged assignment of this bond to Francis; admits that, December 6, 1872, Way executed a bond for the premises to Francis; admits that Way let the Franklin Company into possession, and that said company transferred such possession to McFarland; denies that McFarland transferred said possession to Francis; avers that on or about December 6, 1872, McFarland's

bond was canceled and surrendered, and possession restored to Way, who then and there delivered same to Francis.

Denies that plaintiff was at any time entitled to a lien upon said premises. Admits that plaintiff filed his bill of complaint in the district court of Clear Creek county against said Francis about the day stated in the complaint; that said Francis appeared and answered; that plaintiff obtained a decree as alleged; that a sale took place, and that plaintiff became the purchaser, and received a deed from the sheriff.

Admits that, at the time of exhibiting said bill of complaint, the mill site was situated in the public domain, and was occupied by said Francis as a mill site, with a mill and expensive and valuable machinery thereon, of the value of \$40,000; denies that the mill site was mineral land; admits that said Francis and said McFarland are, and always have been, non-residents; that said Blackman and said Andrew W. Myers were in charge of said mill as agents and servants of said McFarland and Francis until some time in the fall of 1873, when said Blackman was appointed the sole agent of said Francis.

Admits that said mill site is situate in the section, town and range stated, and that in 1872 Jonas Myers applied at the United States land office to enter said lands, and did enter the same, and on the 20th June, 1875, received a patent therefor, and became thereby the absolute owner, which title related back to the time of his application in the land office; that at the time said Jonas made application for said land in the land office said Francis had no interest therein, but before the entry and payment therefor he became interested by virtue of the bond of December 6, 1872; that, after becoming so interested, he was informed of the application of Jonas, and agreed, in consideration of receiving from said Jonas a deed for the mill site and water-power, on said Jonas' obtaining a patent, to contribute all moneys neces-

sary for making such application and paying for said land, one hundred and sixty acres; and said Myers agreed, in consideration of the payment of this money, to convey to said Francis the water-power and mill site; that said Francis was repeatedly requested by said Jonas to perform his said agreement, and furnish the money necessary, but refused, and said Jonas paid for said land, with his own money, \$600; denies that McFarland did not know of the entry by said Jonas; denies that he was not fully advised of said application, and the various steps taken to perfect the title at the time of said application, and that the patent was issued with the full knowledge and consent of said McFarland and said Francis; denies that said Jonas ever agreed with said Francis to convey to said Francis any interest in said lands, except upon the terms aforesaid; admits that said Andrew W., for part of the time while said application for patent was pending, and said Blackman for the balance of the time, were the agents of said McFarland and Francis; denies that they failed or refused to inform said McFarland of said application.

Admits that said Jonas has not conveyed any portion of said property to said Francis. Admits the conveyances charged to Wilson, Blackman and Lehman.

Denies that at the time of the several conveyances and agreements spoken of in said complaint as made by said Jonas to Wilson, this defendant had any notice of the rights of plaintiff to the ground in question.

Denies that said Francis had any right therein; denies that plaintiff did not have notice of the rights of Jonas Myers in the premises, prior to 28th October last; that he became familiar with the terms of the agreement between said Jonas and said Francis as early as 1875; that as soon as said conveyances were made, they were recorded, and became notice to the world.

Denies that Parsons claims any interest. Avers that his judgment has been fully satisfied. Denies that the

conveyances of said Jonas to this defendant and said Henry Wilson were without consideration; but expressly avers the contrary, and that each of said conveyances was and were based on a good and valuable consideration.

March 5, 1880. Answer of Andrew W. Myers and Harriet filed; substantially like that of Blackman.

June 18, 1880. Answer of Lehman filed. As to the bill from the beginning to folio 20, he has no knowledge, information or belief; admits the conveyance to him by said Jonas Myers on or about that time for a good and valuable consideration; admits the agreement; "denies that at the time, as charged in folio 22 of the complaint, that he had full notice of the rights of the said Caspar S. Francis and the plaintiff in the said premises;" avers that plaintiff had actual or constructive notice of "said several conveyances and agreements, or one and all of them, on or about November, 1874." "Denies that the said conveyances by said Jonas Myers to him and others, as stated in the complaint, were executed without the payment of any consideration whatsoever by them, or either of them, to said Jonas Myers; but alleges that the conveyance by said Myers to him was for good and valuable consideration, paid, had and received by said Myers."

June 18, 1880. Supplemental answer of Augustus Blackman, that May 18, 1876, taxes assessed for 1875 upon said premises were due, and on that day the treasurer sold the premises to Atkins; deed made May 19, 1879, and conveyed to defendant. That in 1877 the premises were sold to Mills for the unpaid taxes of 1876; deed executed to Mills June 18, 1880; conveyance to defendant, June 23d. Replication to the answers of Blackman and Andrew W. and Harriet Myers. Denies that the bond of Way to McFarland was ever canceled or surrendered, or that possession of said premises was ever restored to Way. Avers that McFarland took said bond as trustee for divers persons, to wit, said McFarland, said Francis and others; and the bond executed to said Francis was

executed by consent of said McFarland, and all concerned, in substitution for the bond executed to McFarland. Whether said Francis ever agreed to contribute the moneys necessary for the entry of said land, or if so, whether he performed said agreement, defendant hath not and cannot obtain information sufficient to found a belief. Denies that Jonas paid for the lands with his own money, or paid the expenses necessary for entering said lands. Denies that plaintiff ever heard or understood, until the coming in of said answer, that any such agreement, as in the answer alleged, was ever entered into between said Francis and said Jonas. Avers, if any such agreement was made, the same was made and entered into while plaintiff's said suit was being diligently prosecuted against said Francis; and plaintiff, if it should be necessary to secure his right, is still, notwithstanding the default of said Francis, entitled to the benefit of said agreement. Denies that plaintiff had either actual or constructive notice of the several conveyances of said premises by said Jonas Myers, until shortly before the filing of plaintiff's complaint herein, nor until after the purchase of said premises in pursuance of said decretal sale.

June 23, 1880. Replication to answer of Lehman. Denies that said Lehman paid anything whatever to said Jonas Myers for said conveyance. Denies notice of any of the agreements or conveyances in the answer mentioned.

Replication to supplemental answer of Blackman. That at the time of the alleged assessment and levy of taxes for 1875, and at time of levy and assessment for 1876, and thereafter until now, said Blackman was in the actual possession of said premises, by means whereof it became and was the duty of said Blackman to pay said taxes without suffering said premises to be sold.

2. That if the supposed title derived by said Atkins or Mills, in manner as stated, etc., hath at any time come

to said Blackman, said Blackman, at the time of obtaining each of said supposed titles, was holding said premises as trustee for plaintiff.

3. As to so much, etc., if any such assessment of taxes as supposed, etc., for the year 1875, was ever made, said premises were then part of the public domain of the United States.

Avers the assessment and levy of taxes upon said premises for 1875, and the sale of said premises for non-payment; traverses *seriatim* and specifically, compliance with either or any provision of the statute.

5. That if any sale was made to said Atkins for the non-payment of the taxes of 1875, said Atkins did not discharge the taxes subsequently accruing.

6. As to so much, etc., as sets forth the assessment of said premises, and the levy of taxes for 1876, traverses *seriatim* and specifically, compliance with either or any of the provisions of the statute.

Default of Francis.

Answer of Jonas Myers. Conforms to the answer of Blackman, except as follows: That after his application to enter said land, * * * said McFarland and Francis, or one of them, became indebted to this defendant Blackman, Wilson, Lehman and Andrew W. Myers, each, * * * by reason of labor in and around said mill, and for materials for making improvements upon same, and running and operating said mill; that in order to secure these men * * * the money due them, it was agreed between McFarland, Francis and defendant, that defendant should enter said lands, and in case McFarland and Francis, or one of them, did not pay, etc., they should receive from defendant a title in proportion to the amount due them respectively, * * * after said land was entered; said Francis and McFarland wholly failed to pay said, etc., whereupon, with the knowledge and consent of said Francis, defendant conveyed, etc.

Replication to answer of Jonas Myers. Answer of

Parsons admits that the judgment recovered by him against said Blackman has been fully paid. Disclaimer. September 20, 1880. Default of Francis vacated, *alias* summons awarded.

Default of Wilson entered.

Judgment order. Bill dismissed.

The bill of exceptions discloses:

The deposition of Alonzo Mason:

I am seventy years old; from 1865 to 1875 resided at Masonville, Clear Creek county; know the mill there—put up by Federal Union Co.; know plaintiff, and Andrew and Harriet Myers, Blackman and Jonas Myers. Andrew Myers and Blackman had the management of the mill for a Pennsylvania company. Recollect when Jonas came out; from that time until 1875 he lived in one of the mill houses; used to see him in the mill and the yard. Never saw him do anything but look at the boys stirring the furnaces. He had no residence separate from the mill house that I know of. Used to know the corners of the quarter section on which mill is situated.

Jonas Myers never had any house or cultivation or settlement anywhere in that quarter section to my knowledge. A. W. Myers came to me in 1872 or 1873, and wanted me to withdraw an adverse claim I had put in against the entry of that quarter, and to use my influence with Elisha Wells and Joseph Bennett to withdraw theirs; said he wanted to pre-empt that piece where the mill stood, to make it more permanent for the Pennsylvania Company. I told him Judge Wells had a claim against the land, and asked him if it would injure that claim. He said no, not at all.

The deposition of W. A. Arnold:

I am fifty years old; was receiver of the land office at Central City from May 1, 1869, to December, 1873; resided at Central City from that time to May, 1880; after my official connection with the land office terminated I was engaged in practice as an attorney before the land

office. I know something about the entry by Jonas Myers of the S. W. $\frac{1}{4}$ of sec. 32, Tp. 3 S., 72 W. Application was made to enter that land in his name while I was receiver. June 19, 1872, there was a hearing before myself and the register to determine the mineral or non-mineral character of the land. The person most active in making that application and pressing the inquiry was the defendant Andrew W. Myers. He paid the fees and expenses. These proceedings were adjudged irregular by the commissioner of the general land office. About June 28, 1873, Andrew W. Myers employed me to institute proceedings for a new hearing, which was had. I conducted it. The land was adjudged non-mineral; and the commissioner allowed the entry. A. W. Myers then employed me to draw up papers for the entry. He was the active man in all these proceedings, and paid me my fees. Jonas Myers was present at all these proceedings, but never gave me any directions. At the time of the entry of the land Joseph M. Marshall was register and E. W. Henderson receiver. I know the defendant Blackman. He was a witness to the fact of cultivation and settlement at the time of the entry.

The deposition of Joseph M. Marshall:

I am fifty-seven years old; know the plaintiff and the defendants Blackman, Andrew Myers and Jonas Myers. Was register of land office at Central City from November 1, 1873, to July 1, 1879. Recollect very well the pre-emption cash entry of S. W. $\frac{1}{4}$ sec. 32, T. 3 S., R. 72 W., made in name of Jonas Myers. The entry was made after I came into office. Andrew W. Myers was the active party in making the entry. He transacted the entire business with his attorney, Col. Arnold. He presented this man, whom he called Jonas Myers, to make the affidavits required for the pre-emption. My recollection is that Andrew W. Myers paid the price of the land and the fees. I am pretty confident that Andrew W. Myers and Augustus Blackman were the witnesses.

The deposition of Augustus Blackman:

I am forty-nine. Reside in Georgetown. Know the Masonville mill; there is one house, one barn, and the mill there; these were there when the Franklin Company purchased. The Franklin Company did not put up any improvements; the improvements were commenced by George F. McFarland. He put up ten stamps, six Varney pans, three settlers, a reverbatory furnace, and an Arey furnace; all these were put up by G. F. McFarland and Caspar S. Francis, 1870-1873. A. W. Myers was the general manager for McFarland and for Francis, and appointed me as agent under him. Myers lived at Masonville in one of the houses I have mentioned, in 1870-'71-'72-'73. He had general charge. I was subject to his orders up to June, 1873; up to that time I was in the employ of George F. McFarland. There was no time in 1870, 1871, 1872, and up to June 10, 1873, when the property was in the possession or control of any one else, I think. I was in charge after June 10, '73, to October, '73, and then remained in charge for a long time. Nothing was said to me about leaving. When there was any business they called on me. I remained there two years after that, living in that house on the mill property. I then moved to Georgetown; there was a Frenchman living there, and I told him to look after the mill property. I kept the keys and have them yet.

Defendants' attorney here admitted that at all times after September 8, '73, defendants Blackman and A. W. Myers had actual notice of the pendency of the former suit of the present plaintiff against Caspar S. Francis, George F. McFarland, George Way, Erskine McClellan and Chas. R. Fish, and the claim of lien, asserted by plaintiffs therein as set forth in the complaint in this cause, and that the other defendants in this suit had such notice of said matters as the record of said suit afforded.

I know Jonas Myers; he resided in Masonville from 1870 to November or December, 1873. Then he moved

to Georgetown, and resided there until he left the country, two years afterwards.

While he lived at Masonville he lodged at the mill house principally. He was an employee of the company, and received wages as an employee. Boarded part of the time at the company's boarding-house, and part of the time he batched. By the company I mean George F. McFarland and Caspar S. Francis. He never had any residence in that vicinity, except the mill house. I knew about the application made in the name of Jonas Myers to pre-empt the quarter section where the mill property is situate. A. W. Myers wanted a patent. That was the only way to do, so he had it entered in the name of Jonas. The paper marked "D. S. B. 1," attached to deposition of John Wiest, in this case, is, I believe, in my handwriting. It was prepared at instance of Francis, Wiest and Guss. McFarland and Francis, or those whom they represented, had expended about \$25,000 on this mill up to that time. The money for the payment of the land was furnished by the defendants, Henry Wilson, Joseph Lehman, Jonas Myers, A. W. Myers, Harriet Myers and myself. We paid our proportion of the cost of the entry, each man. That was all we paid Jonas Myers for his conveyance of an interest in this land. Neither Wilson nor Lehman paid any other. Lehman worked at the mill off and on for about a year and put some money in. After Jonas Myers had taken steps to enter the land for Francis, he had gone as far as he could without money. Francis had agreed to pay the expenses to get a patent, as I supposed; and as he wouldn't send any money, as he protested a draft that was sent for money to pay this thing with, and was so much indebted to each of us, Jonas said if we would pay our proportions according to the different amounts due each of us, he would go on and perfect the title, and deed to each to secure our debts. Can't remember now whether at that

time there was any talk between us or any of us as to the plaintiff's claim.

[Defendants' attorney here stipulated that the witness at all times, while residing at the land in complaint mentioned, was residing at the mill of the company, and whenever at work for the company was employed as the servant of Geo. F. McFarland or Caspar S. Francis.]

Cross-examined:

So far as I know, Francis and McFarland were representing other parties; never knew the exact state of things. Remember the commencement of the former suit by Mr. Wells. Had a talk with him at Thatcher's Bank, Central. He said at that time, "Jonas Myers has taken steps for a patent?" I told him, "yes." Francis owed me, Lehman, Wilson, and the Myers, at time we agreed to enter the land, \$14,000. Our object in taking title from Jonas was to secure these claims. The conveyances he made were in pursuance of this arrangement. The patent was recorded August 20, 1875.

[Plaintiff here admitted the record of the patent at the date mentioned.] Neither Francis nor any of the parties in interest have made any objection to our holding a legal title to the property. Neither Francis nor any one else has offered to comply with the bond made by Jonas.

I now claim to own the interest conveyed to me by Jonas.

Re-examined: Don't recollect that any one else was present at the bank in Central. It was about the time you talked about commencing suit, or had commenced one.

[Admitted that Wilson and Lehman would testify substantially to the same effect as Blackman in respect to the entry, and the conveyance to them of their interests in the land, and the consideration of such conveyances.]

The deposition of E. T. Wells in his own behalf:

Denied the conversation with Blackman. Never heard

that Jonas Myers had made application to enter this land till summer or fall of 1875.

Never had any intimation he had actually entered it, until some time after the last decree was given in the former cause; as late as November, 1879; and then first heard of the conveyances made by Jonas Myers to Wilson, Blackman and Lehman; also then learned for the first time that Harriet Myers was making claim to some interest in the property.

The deposition of S. L. Kelso:

That Jonas Myers never had any residence on the quarter section, except at the mill, where he was a servant.

Also certified copy of decree given in plaintiff's favor June 25, 1879, in his former suit mentioned in the complaint against Francis, McFarland and others, adjudging the sum of \$2,950, and a lien upon the mill and premises, and all interest of Francis, and all equity which by virtue of the bonds, etc., he had therein; directing sale and deed.

The deposition of John Wiest:

I know the Masonville mill; know of the title bond executed by Way to the Franklin Company; it was assigned to Geo. F. McFarland February, 1871, in trust for the parties who contributed money for the improvement of the mill. * * *

Know of bond executed by Way to Francis about December 6, 1872, for same premises.

This bond was executed in lieu of the bond to McFarland, for the purpose of changing the trustee; to be held in trust by Francis for the same parties. The bond to Francis was to be a substitute for the bond to McFarland.

A. W. Myers visited Philadelphia in the fall, 1872, and it was then agreed that Francis should be substituted for McFarland as holder of the equitable title to the mill, and that he should hold the title on the same trusts as McFarland. No new right was to be obtained by any

associate under the new bond, but the rights of all parties should be the same as when McFarland held the bond. The new bond was merely in substitution for that previously held by McFarland.

I went out there with C. S. Francis and A. L. Guss in summer of 1873. We found A. W. Myers and A. Blackman in charge of the property. Went for the purpose of an examination into the management. I heard on that occasion of the application made by Jonas Myers to enter the quarter section in his own name; neither of us knew of it before that. A. W. Myers proposed it, in order to have it in name of some one who could be trusted to assign the title to C. S. Francis, the trustee, for the benefit of the associates. Don't think Jonas said how he came to make the application. Blackman gave us, while there, a bond in his handwriting, signed by Jonas Myers, to execute to Francis a deed.

The paper now shown me, marked "D. S. B. I.," is the paper.

Bond of Jonas Myers to Casper S. Francis, dated June 9, 1873, conditioned as follows:

Whereas, the above Jonas Myers has sold to said Casper S. Francis the S. W. $\frac{1}{4}$ sec. 32, T. 3 S., R. 78 W., Clear Creek county, Colorado, for \$300, to be paid to said Jonas, or deposited to his credit in some responsible bank in Philadelphia or New York, on or before the end of thirty days from the date of said Jonas' receiving a government title to said land.

The deposition of A. L. Guss: Testifies to the same facts as the witness Wiest.

Defendants' case. The deposition of A. W. Myers:

Know the property and the parties. Francis became indebted to me in \$5,900 or \$6,000. It was an open account, running during the whole time I was there. The same parties were interested all the time. Francis also became indebted to Blackman for near the same amount; to Wilson for about \$1,000; to Lehman in some \$1,200 to

\$1,500. Know about Jonas Myers making an application to enter at the land office in Central City, the land on which the works are situated.

Blackman, Harriet Myers, Lehman, Jonas Myers and Wilson contributed the money to make the entry of that land in the land office. Know about Jonas executing a bond to Francis about June 10, 1873. Francis never took any steps, to my knowledge, to comply with this bond. He was notified three or four times, to my knowledge, by letter.

These several parties contributed their *pro rata* proportion of the money to enter this land according to their claims, because they saw no other show to get the money.

* * * * *

Certificate of receiver of land office at Central City that the records of said office show that Jonas Myers made application to enter S. W. $\frac{1}{4}$ sec. 32, T. 3 S., 72 W., October 10, 1874, and entered and paid for said land October 19, 1874.

* * * * *

A stipulation as follows: Agreed that, if H. Blackman was on the stand, he would swear he and the other defendants, except Francis, Parsons and A. W. Myers, have been in possession of said premises in question, holding the same adversely to Francis and plaintiff since the land was entered; that he, Blackman, paid the money to the register and receiver for said land. * * *

Messrs. WELLS, SMITH and MACON, for appellant.

Mr. L. C. ROCKWELL, for appellees.

HELM, J. The following questions are presented by the record in this case, viz.:

First. Were the patentee and his grantees, who are the appellees in this suit, necessary parties to the action of appellant for a vendor's lien? By failing to make

them parties thereto, is he now estopped from testing the validity of their claim of title to the premises in controversy?

Second. Was it necessary in that action to sue Francis as trustee, or to make his *cestuis que trust* parties, in order to reach the entire equitable interest conveyed and held by him under the title bond?

Third. In view of the answers which may be given to the foregoing questions, what are appellant's rights, as disclosed in this action, against the patentee and his grantees?

The suit for a vendor's lien was an equitable action, and the rule is, that, in equity, all persons materially interested in the result of the litigation should be made parties.

The issue tried in that suit was the plaintiff's right to a vendor's lien upon the equitable interest held by Francis in the premises in controversy; appellant, who was plaintiff there, sought no relief whatever against appellees; he simply undertook to subject the equitable title, which passed from Way to Francis under the title bond, to the payment of purchase money due upon the sale of the premises. The fact that appellant became the purchaser at the sale under his decree is unimportant; he obtained by such purchase just what any third person would have secured, *i. e.*, the equitable interest conveyed by the title bond and reached in the decree, together with the rights of Francis in connection therewith. This sale and purchase in no way materially affected appellees; it simply resulted in substituting appellant for Francis, and establishing, so far as title to the property is concerned, between appellant and appellees, the identical relation theretofore existing between the latter and Francis, to the extent, at least, of the interest covered by the decree; it certainly could make no material difference to appellees whether this relation existed between them and Francis or between them and appellant. Therefore,

under the equity rule above stated, appellees were not necessary parties to that action.

But there is another way of determining this question. The title of appellees is adverse to the interest of both appellant and Francis. It is derived directly from the general government by patent, and Francis and appellant hold from another source. As we shall presently see, it is claimed that the law created a resulting trust, in connection with appellees' patent title, in favor of Francis; but this fact, if established, does not change the *status* of the parties so far as the source of title is concerned, and the nature of their holding for the purposes of that suit.

Title bonds are said to be mortgages at common law. *Merritt v. Judd*, 14 Cal. 73. And the relations of the parties are that of mortgagor and mortgagee. *Button v. Sawyer*, 5 Wis. 598; *Lewis v. Harkins*, 23 Wall. 123; 1 Jones on Mortgages, sec. 226.

The action of appellant against Francis for a vendor's lien was analogous to the proceedings for foreclosure of a mortgage.

The equitable doctrine may be considered thoroughly established, that the only necessary parties to the latter action are the mortgagor, mortgagee and persons who have acquired rights or interests through them in the mortgaged premises; sometimes, also, prior incumbrancers may be brought in for the purpose of liquidating their demands. But a person claiming adversely to the title mortgaged has no interest in the mortgage, cannot be affected thereby, and should not be made a party to the foreclosure suit. The rights of such a person cannot, except by consent, be litigated and settled in such proceeding. And a bill which undertakes to accomplish this object is bad on demurrer for misjoinder and multifariousness. *Dial v. Reynolds*, 6 Otto, 340; *Crogan v. Miner et al.* 53 Cal. 15; *Banning v. Bradford*, 21

Minn. 308, and cases cited; *Chamberlin v. Lyell*, 3 Mich. 549; *Roberts v. Wood*, 38 Wis. 68.

A strong analogy also exists between the action for a vendor's lien and that for specific performance. Both grow out of the contract of purchase and directly affect the same principal parties; the object of one is to compel performance of a contract; that of the other is to secure the judicial declaration of a lien upon the property for the purchase money payable under the contract, and both are equitable. So far as the question now under consideration is concerned, we discover very little difference in principle between the two.

But in actions for specific performance the same rule obtains in this respect as in the foreclosure of mortgages. "A mere stranger claiming under an adverse title should not be made a party." 1 Daniel's Ch. Pr. 230, and cases cited; *Lange v. Jones*, 5 Leigh, 192.

We are of the opinion that appellant was not obliged to make appellees parties to his action for a vendor's lien. It is very doubtful, had he done so, whether he could have thus determined their rights under the patent.

We observe, in passing, that that action was commenced four years prior to the adoption of our present Code of Procedure, though, perhaps, this fact in no way affects the question.

The decree in the vendor's lien suit is not entirely free from ambiguity; but giving it the most rational construction, we conclude that the court intended therein to award a lien upon the entire interest passing from Way under the title bond; the sale and purchase thereunder were evidently had upon the theory that the decree actually accomplished this result. These views accord with the admitted averments of the complaint in this case.

It seems that, while both McFarland and Francis really acted as trustees, the trust was secret and the transactions were had in their individual names and capacities;

the title bonds were executed to them as individuals; there does not appear to have been any declaration of the trust or mention of the beneficiaries in writing or of record; the notes for purchase money, even, were signed individually and not as trustee.

The district court may have deemed it a proper case for the application of the rule that, "if it does not appear on the face of the contract or otherwise that the trustees acted as agents, or in a fiduciary capacity, it is unnecessary to go beyond the terms of the contract." 2 Perry on Trusts, sec. 874, and cases cited; *Brown v. Cherry*, 56 Barb. 635.

But we are not prepared to admit that appellees ought to be heard upon this objection. Under any view that can be adopted, Francis himself had some interest in the title bond, and this individual interest passed to appellant under the decree and purchase. Suppose Francis was also acting as trustee for others, and that his *cestuis que trust* have rights that were not reached or affected by the decree; the decree would not entirely fail of effect on this account. Neither Francis nor these beneficiaries are here complaining. Can appellees be heard to deny appellant's right to a judgment in this action against them on this ground? If only the individual interest of Francis was reached by the vendor's lien decree, the relation of appellant to these *cestuis que trust* is analogous to that of joint tenants; and as to their title and rights in the property, those of appellees are adverse. If the court should order appellees to convey their patent title to appellant, he would hold the same in trust for the beneficiaries of Francis to the extent of their interests. They might assert their rights, if any they have, whenever they deemed it advisable so to do; but we cannot conceive that appellees can be permitted to defeat appellant's action on the ground that these beneficiaries have not hitherto claimed, and are not now demanding in this proceeding, a recognition of their interests.

It is doubtful if, under the pleadings, any necessity existed for offering in evidence the decree awarding a vendor's lien; but in any event there was no error in its admission; for, unless rendered unnecessary by the pleadings, it was essential as a prerequisite to the introduction of the sheriff's deed, and therefore constituted the "introductory fact" to an important link in the chain of title upon which appellant relied; this decree, like the deed resting upon it, was admissible for what it was worth; the decree was not intended to conclude defendants in this action; no such result could follow its introduction, for defendants were neither parties nor privies to the suit in which it was rendered. The general rule, that judgments and decrees are inadmissible in evidence, except in suits between parties and privies thereto, is not applicable to the objection, arising as it does in the case before us. It was said by Mr. Justice Story, in a case where this question arose under similar circumstances, that "to reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity, except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alia acta*." *Barr v. Gratz's Heirs*, 4 Wheaton, 213; *Gregg v. Forsythe*, 24 Howard, 179; 1 Wharton's Evidence, sec. 821; *Coursin v. Pa. Ins. Co.* 46 Pa. St. 329; *Cassler v. Shepman*, 35 N. Y. 533; *Prince v. Griffin*, 16 Iowa, 555; *Koogler v. Huffman*, 1 McCord. 495.

Appellant, through his purchase of the property at the sale under the decree rendered in the vendor's lien suit, simply succeeded to the rights connected with the interest conveyed by Way in the title bond.

It is urged by counsel for appellees, that by such purchase appellant took nothing; counsel says that Francis never had any interest in the realty, either individually

or as trustee, the same being a part of the public domain; and therefore, in the first place, no vendor's lien could properly be decreed; and secondly, no interest in the realty and improvements passed by the decree and purchase thereunder.

To this we must answer that Francis, by his agents, had possession of the premises, and had expended upwards of \$20,000 in permanent improvements thereon. He was entitled, upon proper proceeding therefor, to a patent conveying the mill site; by the territorial statutes any person in the actual occupancy of public lands belonging to the United States, with \$100 worth of improvements thereon, might maintain trespass, ejectment and other actions applicable to injuries upon realty, for wrongful interferences therewith; his interest therein was declared to be transferable, and was subject to sale under execution; as a matter of fact, the interest of Francis' grantor, Way, was originally obtained by purchase at sheriff's sale. The actual possession of Francis appears to have continued to the date of the decree. We think, under all the circumstances of the case, that Francis had a tangible interest in the realty, as well as the improvements, which was covered by the decree, although before the decree was rendered the fee was claimed adversely to him.

We now proceed to consider the remaining and most difficult question presented in this case.

Assuming the foregoing conclusions to be correct, what is the attitude of appellant, who has succeeded to the rights of Francis, toward appellees? And what are their respective rights in connection with the property in controversy? Appellees, it will be borne in mind, are Jonas Myers, the patentee, and his grantees.

It is not disputed that all of the appellees, at the time they became interested, were fully aware of the bond to Francis, and of his rights in the mill property. So the further discussion of this subject is not embar-

passed by any complication arising from the interest of purchasers for valuable consideration without notice of the rights of Francis.

We do not understand that appellant undertakes in this action to challenge the validity of the patent on the ground of fraud upon the government. This court has held that a patent, which is not void upon its face for irregularity or fraud in procuring the same, can only be impeached therefor "in a direct proceeding to set it aside." *Poire et al. v. Leadville Imp. Co.* 6 Col. 406.

Besides, this patent covers one hundred and sixty acres of land, including the mill site and improvements; appellant makes no claim, and could not be heard to complain, as to any other part except the premises in dispute.

If we rightly comprehend his position, he does not question the validity of the patent; his contention is, that appellees held the fee thereunder as trustees of a resulting trust, Francis being the beneficiary; and that as the successor of Francis he is entitled to a decree compelling them to execute the trust.

It appears that appellees, with the exception of Harriett Myers, were employed by Francis at one time or another upon the mill premises; and that when the proceedings were renewed for patent and the entry made, two of them were still in his service, and were acting as his agents in possession, he being a non-resident.

Appellant asserts, as matters of law, that since Blackman and A. W. Myers were the employees and agents of Francis, holding possession and managing the property solely for him as their employer and principal, they could not acquire and retain adverse title thereto; that occupying this fiduciary relation towards him, they would not be permitted to procure absolute title to his estate; that such title thereto, so procured, inures to his benefit by estoppel; that they, and those who conspired and confederated with them to obtain the patent, did so in fraud of his rights, and that all parties to this conspiracy are

estopped by the fiduciary relation of Blackman and A. W. Myers from denying his claim to that portion of the patented ground embracing the mill site and improvements connected therewith. And that upon the facts in this case, under the foregoing legal principles, appellant, as successor to the rights of Francis, is entitled to a decree as aforesaid.

There is no doubt concerning the correctness of the propositions, that "no one whose duty to another is inconsistent with his taking absolute title to himself will be permitted to purchase for himself;" that "no one can hold a benefit acquired by fraud or a breach of his duty;" and that title procured to that which may properly be termed a trust estate, by the trustee or agent for his own advantage, and against the interest and without the consent of his beneficiary, employer or principal, will be declared in equity to be held in trust for the latter. 1 Perry on Trusts, sec. 206, and cases cited; Ewell's Evans Agency, pp. 358 and 359, and cases cited; Wharton's Commentaries on Agency, secs. 244 and 241; Pomeroy's Equity Jurisprudence, sec. 959; *Rings et al. v. Burns et al.* 10 Peters, 280; *Threadgill v. Pintard*, 12 Howard, 38; *Bush v. Marshall*, 6 Howard, 291.

We are disposed to hold, with appellant, that the rest of appellees are in no better position than are Blackman and Myers; at the time of the renewed patent proceedings they had full knowledge of the equitable rights of Francis, which knowledge was obtained while they were in his employment upon the premises; with this information thus acquired, though no longer his agents, they conspired with Blackman and Myers, who were; and through this conspiracy obtained whatever interest they hold under the patent. It would be a lame conclusion, indeed, for us to say that, in a court of equity, under these circumstances, they have any greater rights or any stronger claims in connection with the disputed premises than have their confederates, Blackman and Myers.

We must pause here and consider what effect, if any, the bond or agreement given by Jonas Myers to Francis had upon the rights of the parties.

It is conceded that that instrument was of no binding force; it was conditioned for the conveyance to Francis of title to the quarter section within thirty days after patent, upon payment by the latter of \$300 therefor. Aside from the question of fraud, claimed to be apparent on the face of the instrument, it is sufficient to say that it was signed by but one party, was without any present consideration, and therefore a mere naked promise. It could not, at least until part performance of its conditions, be enforced by or against either person mentioned therein. It was executed and delivered on the 10th of June, 1873; at that time the patent entry had not been made; no deed to the land had been given by Jonas to any person; there is nothing to show that Francis then had notice of any collusion of his agents, Blackman and Myers, or either of them, with Jonas in the patent proceedings; the agreement makes no allusion to the mill site or improvements, but covers the whole quarter section applied for. In view of the great value of these improvements, it appears reasonable to suppose that the \$300 to be paid was a reimbursement simply to Jonas for his expenses in procuring the patent, and compensation for the part of the quarter section not claimed under the title bond from Way. If this transaction shows anything at all with reference thereto, it is that Francis claimed, and Jonas recognized and conceded, the ownership of the mill site and improvements. It could hardly be possible that Jonas asserted any right to this property, or that Francis admitted that Jonas had any interest whatever therein.

The failure of Francis to comply with the bond and pay the \$300, as specified therein, is mentioned by Myers in testimony and commented upon in argument. But, in our judgment, this is a matter of no significance; for, in

the first place, he was not under obligation to do so; and secondly, Jonas had rendered it impossible to comply on his part by previously deeding away most of the property.

We do not think this transaction bears materially upon the interests and rights of the parties to this suit.

In view of all the facts and circumstances disclosed by this record, and the law bearing upon the various questions presented, our conclusion is that appellees hold title to the premises in dispute in trust for appellant.

But it appears from the answer of Jonas Myers, and also from the evidence, that when the entry was made Francis was indebted to Jonas and the other appellees; that such indebtedness aggregated a large sum, and was for labor and services in running and operating the mill, and for materials furnished in making improvements upon the mill property; it likewise, in the same manner, appears that the collusion in obtaining the patent was mainly for the purpose of securing the payment of these demands; also that the sums contributed toward patent expenses and the interests deeded by Jonas to the other appellees are in proportion to the amounts of their respective claims against Francis.

This was not the way for appellees to obtain security for the payment of their demands; their conduct, notwithstanding this indebtedness, is considered in equity a betrayal of the trust reposed in them; it is not in keeping with the scrupulous regard for the employer's interests exacted under the fiduciary relation existing. We do not think this grievance of appellees prevents the application to this case of the equitable doctrines already announced. But since it palliates their offense greatly, by furnishing an honest motive, and removing the factor of intentional fraud, we are not disposed to ignore it.

It is the duty as well as the province of a court of equity to render exact justice between the parties before it in each particular case, so far as such a course is con-

sistent with that "certainty in legal rules and security of legal rights," which must form the basis of all enlightened and stable jurisprudence.

The well known maxim, that he who seeks equity must do equity, may properly be invoked in deciding this question. It is said that "the court of equity refuses its aid to give the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce." Pomeroy's Eq. Jurisp. sec. 385.

The conditions above mentioned, imposed upon the plaintiff, must relate to "something connected with the subject-matter of the very suit in controversy." *Id.* sec. 387.

The demands of appellees against Francis were for labor done and materials furnished upon the premises in dispute; their principal object in procuring the patent was to obtain security for the payment of these debts, which grew out of and are connected with the subject-matter of the relief sought by plaintiff. Were Francis himself here seeking a conveyance of the trust estate, we have no doubt but that a court of equity would say to him: "You are entitled to this relief, because of the rule and the important principle underlying the same, which prohibits a trustee in possession from procuring title to the trust estate for his own benefit; but in this particular case the moving cause for this act of your agents was the desire of obtaining security for debts connected with the property, which you justly owe them; and while equity would not, in the first instance, assume jurisdiction to coerce payment of these debts, it will say that you must do equity by paying them, as a condition of granting you the relief prayed."

The equitable rule has been announced more broadly than this, though the correctness of the *extension* is

questioned. It is held that where a trustee purchased land in his own name, but in reality for the benefit of his *cestui que trust*, and paid the purchase money with his own funds, the beneficiary must, as a condition in the decree for conveyance, first repay the trustee the amount of other advances to or for him, *not connected in any way with the property so purchased*. Pomeroy's Eq. Jurisp. sec. 392, and cases; Story's Eq. Jurisp. sec. 64e, and cases.

But appellant is not in the exact position Francis would occupy were the latter plaintiff in this suit.

It is conceded that for upwards of six years appellees were aware of the pendency of appellant's action for a vendor's lien, though they were not parties thereto; during this period, therefore, they had knowledge of his claim for purchase money against the premises. With this knowledge the only means they adopted to obtain security for their debts was to procure the patent. Appellant's diligence in proceeding in the proper manner to subject the property to the payment of his claim, at least gave him a right in the nature of a prior equity.

In view of these and other matters disclosed by the record, we are of opinion that appellant is entitled to more consideration than Francis would be, were he before us in the same attitude. And if appellant is willing to accept the amount of the original purchase money found due him in the suit for a vendor's lien, with interest, in lieu of the conveyance, upon the conditions aforesaid, we are disposed to give him the privilege.

Counsel for appellees has entirely ignored in argument the rights claimed under the tax deeds; the length of this opinion justifies us in declining to enter into a discussion of the subject; we will, therefore, dismiss it with the statement that, in our judgment, no rights were thereby acquired which interfere with the foregoing conclusions.

The decree will be reversed, but we deem it unnecessary to retry the entire case. Appellant may cause to be

taken proofs to establish the amount of the just demands of appellees against Francis and McFarland for labor, etc., upon the premises; also the amounts disbursed by them for taxes, and a fair proportion of the patent expenses; and, upon payment of the aggregate thereof, with legal interest thereon, within forty days after such determination, he shall be entitled to a deed to the premises in controversy as described in the decree for a vendor's lien. Provided, that if, within forty days from the date of remanding this cause, appellant shall, in lieu of compliance with the foregoing directions, elect to accept from appellees the sum of \$2,950 found due him in said decree, together with legal interest thereon from the date of such decree, and also the costs adjudged to be due him in that suit, then and in that event, if appellees, within forty days after notice of such election, shall pay the same, they may retain title to the property as it now appears of record; failing to make such payment within the time aforesaid, after notice of appellant's election, appellees shall be deemed to have waived their right to retain title, and shall, upon reimbursement to them of the proper proportion of the patent and tax expenses, determined as aforesaid, and legal interest thereon, convey the same to appellant. The costs of this appeal will be equally divided between the parties.

The cause will be remanded, with directions to the district court to proceed to judgment in accordance with the views and suggestions herein expressed.

Reversed.

TABOR V. SAMPSON.

In the absence of proof of actual notice, a mortgagee under a chattel mortgage, with insufficient description, and not recorded in the county in which the personal property is found in the possession of the mortgagor, may not defeat the rights of a purchaser thereof at judicial sale.

Error to District Court of Chaffee County.

THE facts are stated in the opinion.

Mr. A. S. WESTON, for plaintiff in error.

Mr. JOHN L. JEROME, for defendant in error.

STONE, J. One Perley Wasson was the owner of a large number of horses, mules, stage coaches and equipments employed in running several stage lines to and from Leadville, and in October, 1880, for the expressed purpose of securing payment of a promissory note of about \$2,000, held by Tabor, the plaintiff in error, said Wasson executed a chattel mortgage to said Tabor of his stock in trade, comprising about seventy head of horses, three head of mules, a large number of stage coaches, wagons, sleighs, buggies, harness, one barn, furniture and equipments; which chattel mortgage was duly acknowledged and recorded in the county of Lake. Wasson retained possession of the mortgaged property, and some time in December following, some of the same property, which at the time was at Buena Vista, in the county of Chaffee, was attached at the suit of certain creditors of Wasson, and the attached property sold by the sheriff of Chaffee county. Sampson, one of the defendants in error, was a purchaser at this sale of one span of mules and eight head of horses. A few days after the sale, Wasson took from the stable where they were kept at Buena Vista the mules and horses which had been purchased by Sampson as aforesaid, and carried them away, whereupon Sampson replevied the same, and Tabor interpleaded therein, claiming the property under his chattel mortgage, the terms of which provided that he was authorized to take immediate possession of the mortgaged property in case the same should be removed from the county of Lake, or be attached by any person or claimed by any third party.

The controversy, therefore, is whether the right of possession of the last mentioned property is in Tabor by virtue of the mortgage, or in Sampson by virtue of the sheriff's sale.

The case was tried to the court below, by consent of parties, without the intervention of a jury, and a finding and judgment rendered in favor of Sampson for possession of the property in controversy. Several questions, presented by the assignment of errors, are discussed by counsel in the briefs filed, but the only one we deem it necessary to pass upon, in view of the issues made by the pleadings below, relates to the sufficiency of the mortgage as against the rights of Sampson as purchaser at the judicial sale.

We think the mortgage insufficient to defeat the rights of the purchaser, for two reasons: uncertainty in the description of the property, and the non-recording of such mortgage in the county where the property in question was, and in the possession of the mortgagor at the time it was attached. The only description of mules in the mortgage was, "2 mules bays, 1 mule dun," while some of the horses were described singly and in pairs by name only, as for instance: "2 horses, Dock and Gertie; 2 horses, Monkey and Mickle; 2 horses, Bill and Maggie; * * * 1 horse, Black Baby; 1 Keno; 1 horse, Bill; 1 horse, Poney; 1 horse, Frank," etc.; but most of the number are mentioned by a lumping enumeration merely, as "4 horses, brown; 6 horses, mixed; 4 horses, mixed; 2 horses, Bud and Jim; 20 horses, mixed; 2 horses, gray," etc.

No place was mentioned in the mortgage where any of these animals were kept, situate or used, or for what purpose used, or that they were used at all, nor was there any other or further description than such as given in the examples above quoted. What may properly be regarded as a sufficient description of horses and cattle, in an instrument of conveyance, depends to some extent upon

circumstances, aside from the peculiar description of the animals themselves. For example, if a mortgagor owned but a small number of such animals, and should include in the mortgage all that he owned, stating therein the place or places where they were kept, or the uses in which they were employed, a less particular description of each by natural marks or individual characteristics would suffice for identification, than if the mortgagor were owner of a large number, a part of which only were included in the mortgage, and no information should be given in the instrument of the place where the animals were kept, or for what purposes or uses, whether freighting, carriage driving, riding, racing or breeding.

Wasson himself testifies that he had six head of horses in Chaffee county which were not included in the mortgage, so that, had this mortgage been recorded in Chaffee county, it must have been impossible for any one reading the mortgage to have identified those six head as *excluded*, or any other twenty head found in that county as *included* in the number designated in the mortgage as "20 horses, mixed."

In *Lawrence v. Evarts & Cooper*, 7 O. St. 197, the court say: "Any description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient. The identity of the property is not, in such cases, ascertained by any specific description which distinguishes it from other property of the same kind or species, but by its locality." In that case the description was, "all the stock, tools and chattels belonging to" the mortgagor, "in and about the wheelwright shop occupied by him," and this was held sufficient, for the reasons above expressed. See, also, *Kelley v. Reid*, 57 Miss. 89; *McCord v. Cooper*, 30 Ind. 10; *Golden v. Cockril*, 1 Kan. 259.

Our statute concerning chattel mortgages provides that such mortgages shall be "good and valid" from the time they are recorded "in the county wherein the property

mortgaged, or the greater portion thereof, shall be situated." This mortgage was recorded in Lake county alone, but there is not a word in the mortgage itself, or in the testimony in the case, as disclosed by the record, to indicate that the property mortgaged, or the greater portion thereof, or that a single item thereof, was in the county of Lake. Wasson himself testifies that the horses and mules in controversy were on some of his government "mail routes around Leadville." They were found and seized in the possession of Wasson, as the owner, in the county of Chaffee, by the sheriff of said county, and wherein the attaching creditors resided.

There was no proof of actual notice, nor did the records of either Chaffee county or Lake county furnish constructive notice that the horses and mules in controversy, at the time of the seizure and sale, were subject to the rights claimed by the plaintiff in error by virtue of the chattel mortgage in question. We must, therefore, hold that the right of possession to the property claimed by the plaintiff in error as mortgagee, at the time of the seizure and sale as aforesaid, was not sufficient to defeat the title acquired by defendant in error, Sampson, as purchaser at said sale, and the judgment of the court below will be affirmed.

Affirmed.

7	430
7	436
8	99
7	430
2a	506

DANIELS ET AL. V. LEWIS ET AL.

A liberal construction must be given to the provisions of the Civil Code, to the end that the legislative intent may be made effectual. Under section 116, the proceeds of attached property may be prorated between the creditors therein specified—the words "returned to the same term of the court to which they are returnable," being interpreted to mean and apply to all writs of attachment which are in fact returned to at or during the same term of the court, at or during which they may be properly returned, after service according to law.

Appeal from District Court of Arapahoe County.

THE case is stated in the opinion.

MESSRS. BENEDICT & PHELPS, for appellants.

MR. JOHN L. JEROME, for appellees.

STONE, J. The question presented in this case is whether attaching creditors, under our statute upon the subject, where more than one such creditor proceed against the same debtor, are entitled to satisfaction of their judgments, according to priority, in point of time, of the service of their writs, or to distribution of the proceeds of the property attached, in proportion to the respective amounts of their several judgments. The provisions of the statute, under which the question arises, are contained in section 116 of the Code of Civil Procedure. So much of said section as is pertinent to this controversy is as follows, viz.:

“In all cases where more than one attachment shall be issued against the same person or persons, and returned to the same term of court to which they are returnable, or when a judgment in a civil action shall also be rendered at the same term against the defendant who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to, out of the property of the defendant attached, either in the hands of the garnishee or otherwise, after the sale and receipt of the proceeds thereof by the sheriff, calculating such amount in proportion to the amount of their several judgments, with costs, as the same will respectively bear to the amount of the sum received, so that each attaching and judgment creditor will receive his just part thereof, in proportion to his demand; the clerk shall thereupon certify the several amounts thereof to the sheriff, who shall pay over to the respective parties the several sums so

certified, and indorse such payments on the respective executions." * * *

This provision was first enacted by the territorial legislature in 1861, copied from a like statute of the state of Illinois, and remained upon our statute books until the adoption of the Code of Civil Procedure, when it was repealed along with the old practice acts, but at the same time re-enacted as section 116 of the said code.

The question involved is one of construction of the statute above quoted in view of our present practice act, the point being made by plaintiffs in error, that, since the Civil Code has changed the practice in respect to the return of process, the section in controversy is no longer applicable, and cannot be made to conform to the present system of practice touching the issuance and return of process.

Under our former practice, before the adoption of the Civil Code, the same construction was put upon this section by our courts as had been given it by the courts of Illinois, from which state we adopted it, together with our general practice act, which made the writ of summons in ordinary civil actions returnable on the first day of the next term of the court in which the action was commenced (R. S. p. 500, sec. 1), while, under our present practice, as established by the Code of Civil Procedure, such writs are not made returnable on a day certain of a particular term. While the practice in this respect was thus changed by the code, there can be no question that the legislature, by incorporating this provision of the old attachment act into the new, intended to continue the system of prorating the proceeds in attachment cases among creditors as under the former practice in such cases. This being the unquestioned legislative intent, we should seek to give effect to such intent if possible. And it may aid somewhat in construing the section so as to effectuate this intent, if we bear in mind that the change in the practice respecting the

return of process swept away the former construction of the provision in question, so that it now stands just as though it were a new provision, originally enacted as a part of, and to be construed in connection with, the new system of practice. We cannot give to the word "returnable" the same technical meaning it had under the former practice, where it was referable to a specific "return day," but there does not appear to be an insuperable difficulty in giving it a meaning properly conformable to the intent and requirements of the existing practice act. Sections 445 and 446 of the code declare that "the provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction;" and "the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed with a view to promote its object and assist the parties in obtaining justice." We think the case before us is one wherein the foregoing rules of construction, prescribed by the code for its own interpretation, are peculiarly applicable. As was said by the court below in this case: "The object of the statute manifestly is, and always has been, that creditors pursuing the same debtor by attachment should, * * * under certain conditions and limitations as to time, prorate in the proceeds of the property attached. Time, under the old system, as well as under the new, was the essential condition and limitation. The returnability of the attachment writs and their actual return served to limit the time as to the attaching creditors, but creditors in ordinary civil actions, who obtained judgments against the same debtor at the proper term, were allowed to prorate without reference to the returnability of their writs, and even if their judgments were rendered without summons at all, as by confession or voluntary appearance."

Mr Webster defines the word "returnable" to mean,

"1. Capable of being returned. 2. (Law) Legally required to be returned, * * * as a writ, returnable at a certain day; a verdict returnable to the court."

Under the present as well as the former practice, writs are required to be returned, and are returnable to the court issuing the same, and when they are capable of being properly returned after service, at or during a term of court, and are in fact so returned, that would seem to be a substantial compliance with the conditions of the section under consideration; for, if a writ is properly returned at or during a term of court, we think, under the liberal construction which, by the requirements of the code, is to be given its provisions when necessary to effectuate them, such writ should be regarded as returnable to that term.

It was suggested in argument that, under this construction of the statute, the rights of creditors in many cases would not be secured. This may be true, but that it was also true under the former practice is abundantly illustrated in the experience of almost every court where that practice prevailed. Several instances of these defects in the application of this statute under the former practice are pointed out in the opinions of the supreme court of Illinois, where questions arising upon the proper construction of the law were passed upon. In the case of *Rucker et al. v. Fuller*, 11 Ill. 223, Mr. Justice Trumbull, in delivering the opinion of the court, says: "Why the legislature should have provided for an equitable distribution of the proceeds of attached property among creditors whose attachments are returnable to the same term, although the judgments may be entered in said attachment suits at different terms, while a creditor in a civil suit should not be permitted to share with the attaching creditors, although his suit may have been pending at the same time with the attachments, unless he can obtain judgment at the term to which they are returnable, is not for the court to inquire. The whole matter is

one strictly of statutory regulation, and when the legislature has clearly declared its intention, the courts have no power to depart from the plain language and requirements of the statute for the purpose of establishing, as they may suppose, a more equitable rule." Many other of the Illinois cases present illustrations of the difficulty in making the law, under the old practice, cover every case which claimed the same remedy, where some fell short of its arbitrary provisions. That our present statute, considered with respect to the present practice, is imperfect and bungling, must be conceded, and that the defects may, as far as possible, be amended by the next legislative assembly, is to be hoped. It is no easy matter to devise a law which will measure out exact justice, and provide for an equitable adjustment of the claims and rights of creditors when pursuing a common and often insolvent debtor. Mechanics' lien laws, bankruptcy acts, and other like statutes, as well as attachment laws, furnish ample proofs of the difficulty in justly framing and applying such laws. The inequities and hardships arising out of the law itself and its judicial administration are matters that appeal to the legislature, and not, as a rule, to the courts for relief. Questions may arise which we are not called upon to anticipate or decide in the case now before us; but considering this case alone, we think the prorated provisions of the statute can be made operative under our code practice, upon the construction of the language we are inclined to adopt, and we therefore hold, as was held by the court below, that in this and other similar cases, the words "returned to the same term of the court to which they are returnable," should be interpreted to mean and to apply to all writs of attachment which are in fact returned to, at or during the same term of court at or during which they may properly be returned after service according to law; and the judgment of the district court is accordingly affirmed.

Affirmed.

DAVIS V. EXCELSIOR CO.

Error to County Court of Arapahoe County.

Messrs. FRANCE & ROGERS, for plaintiff in error.

Mr. W. W. COVER, for defendant in error.

Per Curiam: This case involves the same question as that considered and decided in the foregoing case of *Daniels v. Lewis*, viz.: whether the prorate provisions of section 116 of the Code of Civil Procedure, for the distribution of the proceeds in attachment cases, are operative under the code system of practice; and for the reasons expressed in the opinion in the said case of *Daniels v. Lewis*, the judgment of the court below in this case will be affirmed.

Affirmed.

LEITENSCHORFER V. KING, ADM'X.

1. Under an *indebitatus* count properly stated, under the old system of practice, plaintiff might recover the amount due him without a *quantum meruit* count, although no specific sum was agreed upon. But the code abolishes these distinctions in the forms of action, and only requires that the complaint state, in concise language, the ultimate facts constituting the alleged cause of action.
2. When the jury have before them all the facts and circumstances attending and surrounding a transaction, the opinions of experts as to value, based upon the same evidence, are not conclusive; these opinions are not to be substituted for the common sense and judgment of the jury. The purpose of their introduction is to supplement the general knowledge and experience of the jury.
3. What amounts to ultimate success in a suit is a question of law for the court.
4. A party may not take advantage of an erroneous instruction given in his favor, and by which he could not have been prejudiced.
5. The supreme court will not interfere with the finding of a jury upon a disputed question of fact, in connection with which there is a material conflict in the testimony, unless such finding is so unreasonable as to create a strong presumption that they were in some way misled, or were controlled by improper motives, or influenced by passion or prejudice.

7	436
11	543
7	436
12	451
7b	436
19	8
7b	436
6a	408
7b	436
10a	145

Error to District Court of Arapahoe County.

THE facts are stated in the opinion.

MR. F. TITUS and MR. E. MILES, for plaintiff in error.

MESSRS. WELLS, SMITH and MACON, for defendant in error.

HELM, J. Defendant in error brought suit as administratrix in the court below, to recover fees for services rendered by her intestate, John Q. A. King, in his lifetime. Deceased was employed in 1877 by plaintiffs in error, as local attorney and counselor, to conduct a suit then pending in the federal court at Denver. This suit involved the consideration of novel and complicated questions, and though prosecuted with diligence was not determined till July, 1880. At that time a decree was rendered in favor of plaintiffs in error, who were plaintiffs therein. Gov. King died after the cause was submitted, but before entry of the decree; during this period of nearly three years he received no compensation whatever from plaintiffs in error. He was also retained by them and took some steps in another suit subsequently commenced against them; in connection with this latter cause he was paid a retainer fee of \$50, but no more.

The complaint in this case avers the performance of these services at the instance and request of plaintiffs in error, and their failure to pay the fees therefor, and places the reasonable amount thereof at \$10,000. The answer, among other things, pleads a special and distinct "understanding and agreement" with deceased, that his compensation for services in the prior suit should be the reasonable value thereof, and should be wholly contingent and entirely dependent upon the ultimate success of the complainants; that said suit is yet undetermined; defendants have not yet recovered the lands involved, and therefore the contingency has not happened. It also

avers that deceased was simply employed to act as merely assistant counsel, and only for the purpose of attending to motions and other interlocutory proceedings. These averments were traversed by the replication.

The jury returned a verdict in favor of the plaintiff, who is now defendant in error, for the full amount demanded in the complaint; to reverse the judgment rendered thereon, the cause is brought to this court.

The first assignment of error relates entirely to the instructions given at the trial in behalf of the plaintiff. Four of the objections stated and discussed by counsel under this assignment we deem important, and will, therefore, proceed to consider them.

First. It is claimed that plaintiff, in the complaint, averred, or undertook to aver, a cause of action in *indebitatus assumpsit*, and therefore the instructions, and the recovery thereunder, being upon the theory that the suit was on a *quantum meruit*, were clearly erroneous.

The language of the complaint is in some respects similar to that used under the former practice in the *indebitatus* count; but even with that practice this particular point would not be well taken. It is held that under the *indebitatus* count, properly stated in his declaration, plaintiff may recover whatever is due him, although no specific sum was agreed upon, and that the *quantum meruit* count is unnecessary. Puterbaugh, Pl. & Pr. 69 and 72, and citations.

But it is sufficient answer to counsel's argument to suggest that our Code of Procedure ignores these distinctions in the forms of action; that the complaint complies with the code requirement by stating in concise language the ultimate facts constituting the alleged cause of action. Had an objection been interposed at the proper time, it is possible that the district court would have required a more specific statement of some of the matters averred. The complaint does not aver that defendants "promised to pay" (a legal conclusion, the statement of

which seems to have been required under the old practice to enable him to recover on the *quantum meruit*); it does, however, declare that the services were rendered at the request of the defendants, and that they thereby became indebted, etc. No material averment, under the present practice, is omitted from the complaint, and thereunder plaintiff was entitled to recover, if at all, the reasonable value of her husband's services, regardless of contract.

Second. The first instruction, it is said, precluded the jury from using their own knowledge and experience in determining the value of deceased's services, and confined them to the opinions of the experts sworn. No doubt exists as to the correctness of the general legal rule stated by counsel. In *Head v. Hargrove*, cited, Mr. Justice Field says: "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services." 15 Otto, 45.

When a jury have before them all the facts and circumstances attending and surrounding the transaction, the opinions of experts as to value, based upon the same evidence, are not conclusive; these opinions are not to be substituted for the common sense and judgment of the jury; the purpose of their introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment, to the end that a more just and accurate conclusion as to value may, by them, be drawn from the evidence.

But we do not think the instruction liable to this objection. The jury are told therein that their "finding as to such value should be a fair and reasonable sum, according to the evidence, after considering all the evidence upon the subject, no more and no less."

It would be an unwarranted conclusion that the jury interpreted these words as confining them to the opinions of the lawyers sworn on this subject; on the contrary, the obvious and natural meaning thereby conveyed is, that they were to bring to bear upon all the evidence, including the opinions of experts, their own knowledge and common sense, and determine the question accordingly; the expression, "no more and no less," is simply a prohibition against their assessing the amount of plaintiff's recovery at more or less than such reasonable sum as in their judgment would be equitable and just under the entire evidence before them. An instruction stating specifically the rule relating to this kind of evidence would have been proper, and had such an instruction been asked the court would not have refused it. In the absence of a request therefor, however, the court's failure to submit such an instruction, on its own motion, we do not consider error.

Third. Counsel declare that the court erred in telling the jury, in the second instruction, that ultimate success in the Leitenschorfer suit was attained when a final decree was entered therein.

The instruction notifies the jury that if they find deceased's fees to have been conditioned upon ultimate success in that suit, such contingency happened upon the entry of a decree; ultimate success in a particular suit cannot be said to refer to, or involve, other suits or proceedings which may be necessary before the fruits of the judgment can be enjoyed. This instruction must be interpreted in connection with the fourth given for the defendants. The latter directs the jury to return a verdict for the defendants in case they find that there was a special contract providing for the payment of no fees except in the event of defendants' recovery of the interest which they claimed in the land, unless it appears that they had succeeded in such recovery. The jury could not have been misled in this connection to the prejudice of the plaintiffs in error.

But it is contended that ultimate success included the affirmation of the decree in the supreme court of the United States, should the cause be transferred thereto.

We do not deem it necessary to discuss and determine exactly when ultimate success has been attained in suits generally. The question here is, what final determination was understood and intended, by deceased and plaintiffs in error, in the arrangement concerning compensation for the former's services?

In view of the pleadings, and the evidence in this case, we are satisfied that when this final determination or ultimate success was attained became a question of law, and that the court did not err in fixing upon the entry of a final decree in the circuit court of the United States.

Fourth. The error, if any, committed by the fourth instruction was in favor of defendants below; the evidence expressly mentioned therein was inadmissible, under the pleadings, and probably should have been entirely withdrawn from the jury; if the court erred in allowing them to consider it, in so far as it bore upon the question of reasonable value, provided they found it to have any such bearing, such error could not have prejudiced the defendants.

Under their second and third assignments of error counsel present the objection that the verdict is contrary to the evidence, and also that the amount awarded is excessive.

There are upwards of nine hundred folios of evidence; in many important particulars the testimony is conflicting; the preponderance thereof upon the material questions of fact is probably in favor of plaintiff's recovery; this at least was the conclusion of the jury, and we do not feel inclined to challenge the correctness of their conclusion. This court will not interfere with the finding of a jury upon a disputed question of fact, in connection with which there is a material conflict in the testimony, unless such finding is so unreasonable as to create a

strong presumption that they were in some way misled, or were controlled by improper motives, or influenced by passion or prejudice. *Green v. Taney*, ante, p. 278.

The sum named in the verdict is large; a court, or perhaps another jury, might have awarded less; but we are not prepared to say that it is so excessive as to justify interference therewith by us. A large discretionary power is lodged with the jury in cases like this. In estimating the value of an attorney's services, where no special contract exists fixing the same, they are to consider a variety of facts and circumstances, such as the character of the litigation in which the services were rendered; the novelty, difficulty and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case, as leading or assistant counsel, and the degree of responsibility resting upon him; the length of time necessarily consumed by the trial and other court proceedings; the fact, if it be a fact, that compensation is wholly contingent upon success; the manner in which his duties are performed, etc.

Testing the verdict in this case by these considerations, we cannot say, in view of the evidence, that it is grossly excessive; the services of deceased are shown to have been arduous and laborious; he was not the leading lawyer employed, but Mr. Bradford, his principal, was never nearer than Washington; and while local and assistant counsel only, deceased seems to have been charged with the immediate conducting and management of the case, and to have borne a large part of the responsibility in connection therewith; some of the questions were new, complicated and difficult; his labors extended through a period of nearly three years, and his fees were contingent upon success.

True, plaintiffs in error have, as yet, reaped no direct benefit from the decree obtained, but that decree was the entering wedge to the attainment of vast and valuable property rights; followed up with diligence and success,

its ultimate result, according to the evidence, will be to vest in them title to property valued at nearly half a million of dollars.

There are other assignments, but we do not deem it necessary to consider them; so far as we are advised by the record, no material error was committed in the admission or rejection of testimony. The judgment will be affirmed.

Affirmed.

SWEET V. WEBBER ET AL.

1. Section 2324, Revised Statutes of the United States, appears to require, as prerequisites to a valid location of a mining claim, that the location be distinctly marked on the ground, so that its boundaries can be readily traced, and that such a record of the location be made as will identify the claim and disclose the names of the locators and the date of location. The provisions of this section refer to both lode and placer claims.
2. The act of congress of May 10, 1872, requires an annual expenditure of at least \$100 on all claims thereafter located. Neither a rule of miners nor a state law can authorize less without being in conflict with the law of congress, and therefore void.
3. The right to possession of a mining claim comes only from a valid location; if there is no location, there can be no possession under it.

Error to District Court of Chaffee County.

THE case is stated in the opinion.

MESSRS. HARTENSTINE, McDONALD and WELBORN, for plaintiffs in error.

MR. A. S. WESTON, for defendant in error.

BECK, C. J. This was an action brought by plaintiff in error, in the court below, in support of an adverse claim, filed against an application for a patent to a placer mining claim. Plaintiff claims to own the "Holmes placer claim," consisting of one hundred and sixty acres, situate

in Cottonwood mining district, Chaffee county, by purchase from the original owners, who, it is alleged, duly located it in compliance with the local laws and rules of miners of said mining district, and with the laws of the United States and of the state of Colorado, on the 6th day of January, 1879.

It is alleged, and the exhibits offered in evidence show, that eight persons joined in the location, and that a location certificate describing the premises was filed and recorded in the office of the county clerk and recorder of said county, on the 7th day of January, 1879.

It is alleged that defendants entered upon a portion of said tract, known as the "Ronk placer claim," consisting of forty acres, on the 11th day of May, 1880, and subsequently applied for a patent thereto.

Defendants claimed to have staked off their two claims of twenty acres each, which they style "the Ronk placer claim," on the 20th of March, 1877, but admit that they filed for record no location certificates until April and July, 1880.

The verdict and judgment were for the defendants, and the errors assigned by the plaintiff relate to the rulings of the court upon the trial, and to the instructions given and refused.

The pleadings and proofs show that defendants made no record of their location for a period of three years after "staking" their claim and taking possession of it. They further show that the plaintiff's grantors located and recorded "the Holmes placer claim" (which includes within its boundaries the Ronk claim) one year and eight months after the location of the latter.

The testimony is conflicting as to the amount of work and improvements done and made annually by the respective parties on their claims, but the important inquiry, under the errors assigned, is, was the case tried upon a correct construction of the law applicable to the location and possession of placer mining claims?

Plaintiff in error says defendants failed to comply with two essential requirements, viz.:

First. Their location was not distinctly marked upon the ground so that its boundaries could be readily traced.

Second. No record was made of their location until long after their rights of possession were forfeited.

If the foregoing were essential requirements at the time of defendants' attempted location, and if they were disregarded, as alleged, then the "Ronk claim" was subject to relocation, and if the plaintiff in error and his grantors complied with the law in respect to their location and possession, they were entitled to recover.

The plaintiff's location certificate was at first admitted in evidence, and afterwards rejected, and the jury instructed to disregard it, on the ground that it was made and recorded before the passage of the state statute of June 10, 1879, which requires the recording of a location certificate of a placer claim; the court ruling that, prior to the passage of this act, no location certificate was required to constitute a valid location of such a claim.

Upon the same theory, apparently, the court refused or failed to instruct the jury as to the necessity of marking the boundaries of defendants' claims.

It is conceded that, prior to the act of June 10, 1879, no state statute specifically applying to the location of placer claims existed in Colorado, but, upon the part of plaintiff in error, it is claimed that the act of congress of May 10, 1872, covered this class of claims as well as lode claims, and that a compliance with its provisions was necessary to constitute valid locations of both classes of claims.

The provisions relied upon are embodied in section 5 of said act, which section is incorporated in the Revised Statutes of the United States, and numbered therein section 2324. It provides as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States

or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. On each claim located after the 10th day of May, 1872, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made, during each year. On all claims located prior to the 10th day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the 10th day of June, 1874, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." * * *

The balance of the section makes provision for the forfeiting of the interests of co-owners who fail or refuse to contribute their proportion of expenditures.

Although it was not proven upon the trial that the miners of Cottonwood mining district had made regulations, or that mining usages and customs existed in that district relating to the recording of claims, yet it is a matter of common notoriety that rules, usages and customs existed on this subject in all the mining regions of

Colorado from the earliest days of territorial organization, and it is probable that they prevailed in the district mentioned as well as elsewhere. The failure to prove their existence in this instance may have been in consequence of the rulings referred to.

The above section of the act of congress appears to require, as prerequisites to a valid location of a mining claim, that the location be distinctly marked on the ground, so that its boundaries can be readily traced, and that such a record of the location be made as will identify the claim and disclose the name or names of the locators, and the date of location.

It does not answer the objection that proof was not made of the proper marking of the location upon the ground, to say that the boundaries of the claim in dispute were admitted, on the trial, to be identical with those of the ground sued for. The objection goes to the regularity of the location.

But counsel for defendants in error confidently assert that all the provisions of said section 2324 relate to lode claims only. In this the counsel is greatly mistaken. The provisions of this section refer to both lode and placer claims, as appears by the following adjudications:

The supreme court of California held, in a recent case, that the requirement that on each claim, located after the 10th day of May, 1872, until a patent issue therefor, not less than \$100 worth of labor shall be performed or improvements made each year, applies as well to placer claims as to lode claims, basing the opinion upon the cases of *Jackson v. Roby* and *Roby v. Jackson*, decided by the supreme court of the United States, at the October term, 1883, and upon *Smelting Co. v. Kemp*, 104 U. S. 636; *Carney v. Arizona Mining Co.* 1 West Coast R. 851.

The controversy in *Jackson v. Roby*, *supra*, related to a placer mining claim situated on Blue river, Summit county, Colorado, and the point adjudicated involved

another provision of said section 2324, viz.: "But where such claims are held in common, such expenditure may be made upon any one claim." Mr. Justice Field says: "The contention of the plaintiff was made upon a singular misapprehension of the meaning of the act of congress, where work or expenditure on one of several claims held in common is allowed, in place of the required expenditure on the claims separately. In such case the work or expenditure must be for the purpose of developing all the claims. It does not mean that all the expenditure upon one claim — which has no reference to the developing of the others — will answer." 4 Col. L. R. p. 356.

Mr. Justice Field refers to the adjudication of the same point in *Smelting Co. v. Kemp*, *supra*, where the illustrations are the sinking of a shaft upon one claim or location for the development of several; and the construction of a flume to carry off the waste material from several locations.

Here, then, are decisions showing that two of the provisions of said section are equally as applicable to placer claims as to lode claims.

In *Chapman v. Toy Long*, 4 Sawyer, 33, the point was raised that parties could not locate placer claims *jointly*; but it was decided that the provisions of section 2324, relating to co-owners of mining locations, and providing for forfeiting the interests of any such co-owners who fail to contribute their share of expenditures required by law, applied alike to placer and lode locations.

In Copp's Mining Decisions of the Interior Department, 1874, at page 323, a form of location certificate is given intended to be in compliance with the requirements of the act of congress of May 10, 1872, for either a vein or placer location.

In Morrison's Mining Rights, 1881, page 218, No. 64 of "Land Office Rules" says: "The regulations hereinbefore as to the manner of marking locations on the ground,

and placing the same on record, must be observed in the case of placer locations, so far as the same are applicable," showing the understanding of the land department on these subjects.

The terms "claim" and "location" apply indifferently to both classes of claims; and it is apparent from the phraseology of the acts of congress of 1870 and 1872, considered in the light of the decisions thereon, that it was intended that the same requirements necessary to secure possessory rights, or title in fee, to lode claims, should also be observed in the acquisition of right of possession or title to placers, except where the requirement is manifestly inapplicable to the latter class, or where different provisions therefor have been made.

In this view of the subject there is no reason why the provisions of section 2324, requiring the location to be distinctly marked on the ground, so that its boundaries may be readily traced, and a record of the claim to be made in manner set forth, should not be held equally applicable to both classes of claims.

The theory upon which the case was tried below, a theory, too, entertained by some law writers of repute, was that the provisions of the act of congress concerning the marking of boundaries, the recording of claims, and the performance of annual labor to the extent of \$100 on each claim, did not refer to placer claims.

The court appears to have adopted the view, that if the defendants proved prior discovery of mineral, prior possession, and an annual expenditure of \$25 upon the Ronk claim, these facts constituted a compliance with the law upon the subject, and they were entitled to a verdict.

On the contrary, however, the act of May 10, 1872, as we have seen, includes this class of claims, and requires the observance of all the requirements mentioned in section 2324. The act limits the extent of a claim for a single individual to twenty acres, and instead of an annual expenditure of \$25, as stated in the instructions to

the jury, requires an annual expenditure of at least \$100 on all claims thereafter located. Neither a rule of miners nor a state statute can authorize less, without being in conflict with the law of congress, and therefore void. We are of opinion that section 2 of the act of June 10, 1879 (Laws 1879, p. 140), is in conflict with the act of congress of May 10, 1872, upon this point.

It being evident that error intervened on the trial in respect to the steps necessary to constitute a valid location, and in reference to the requirement concerning annual labor, nothing would seem to remain, in the legal aspect of the case, save the possession. This would clearly be insufficient to protect the claim as against a subsequent valid relocation thereof.

In the language of Chief Justice Waite, in *Belk v. Meagher*, 104 U. S. 284: "The right to possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location.

"A location is not made by taking possession alone, but by marking the ground, recording and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations."

The supreme court of Montana say, in the recent case of *Hopkins v. Noyes*, 2 Pacific Reporter, 281: "Possession within a mining district, to be protected, or to give vitality to a title, must be in pursuance of the law and the local rules and regulations. It must stand upon the law, and be the result of a compliance therewith. * * * Possession without location carries no title. * * * The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location made in pursuance of the law and kept alive by a compliance therewith."

For the errors mentioned the judgment is reversed and the cause remanded for a new trial.

Reversed.

TELLER V. THE PEOPLE.

No appeal lies from a judgment imposing a penalty for contempt of court.

Appeal from Superior Court of Denver.

Mr. W. TELLER, for appellant.

Messrs. L. C. ROCKWELL and D. F. URMY, for appellee.

Per Curiam: The motion to dismiss the appeal must be allowed upon the ground that no appeal lies from a judgment imposing a penalty for a contempt of court.

The cases of *Ex parte Crittenden*, 62 Cal. 534, and *New Orleans v. Steamship Co.* 20 Wall. 392, are conclusive upon the point that the imposition of fines and penalties in contempt proceedings pertains to criminal, and not civil jurisprudence.

In our judgment the proceedings in cases of this character partake sufficiently of the nature of criminal actions to warrant us in holding that they must be reviewed as such. Inasmuch, therefore, as appeals do not lie in this class of actions under our practice, this appeal must be dismissed and the cause remanded, and it is so ordered.

Appeal dismissed.

ATKINSON ET AL. V. TABOR ET AL.

A fund in litigation deposited in a bank which is deemed unsafe; an appeal pending from a judgment disposing of same; a person having a contingent interest in the fund, in common with appellants, withdraws a portion thereof from the bank, with the sole purpose of saving it, in view of the failing condition of bank — the appellee having refused to consent to a change of the place of deposit: *Held*, that the withdrawal is not such an appropriation of the fund in litigation as amounts to a waiver of the right to prosecute the appeal.

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13 355

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17 287

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23 418

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126 484

7 451
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35 373

7 451
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Appeal from District Court of Lake County.

MOTION to dismiss appeal.

Mr. L. C. ROCKWELL, for the motion.

Messrs. MARKHAM, PATTERSON and THOMAS, and Mr. CLINTON REED, *contra*.

Per Curiam: We do not regard Sullivan and his associates as occupying the relation of parties to this litigation. Their interest in the result accrues by virtue of their contract with Atkinson and Chaney, the appellants. If, by virtue of the terms of that contract, Sullivan and his associates drew out and appropriated to their use, or with the intention of so appropriating it, three-fourths of the money deposited by Tabor and Smith in the Bank of Leadville in payment of the purchase money of the Tam O'Shanter group of mines, it was the same in law as if Atkinson and Chaney had drawn the money themselves; and it would be a waiver of their right further to prosecute the appeal. If, however, money and securities to an amount covering the contingent interest of Sullivan and others in the deposit were drawn out of the bank on account of its failing condition alone, and after Tabor and Smith had declined to agree to a change of the deposit to a place of greater safety pending the result of the litigation; and if there was no actual appropriation of such portion of the deposit, and none was intended, but the action complained of was taken merely to secure from the impending disaster that proportion of said deposit to which Sullivan and his associates might become entitled, under their said contract, by the judgment of this court, it would seem to be extending the doctrine of waiver beyond the precedents cited, to hold that the right of the appellants to further prosecute their appeal is thereby cut off.

Some of the alleged facts concerning the purpose and

necessity of the acts supposed to constitute the waiver are disputed, and, without passing upon the conflicting statements, it is sufficient to say that, upon consideration of the case as presented upon the motion to dismiss the appeal, we do not feel warranted in granting the motion. Being of opinion that the rights of the parties should be adjudicated upon the merits, the case will be reserved for final hearing. The motion to dismiss the appeal is denied.

Motion denied.

PEOPLE EX REL. CHAS. E. GAST ET AL. V. BETTS.

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21 530/

An applicant for license as an attorney should submit to an examination as to his qualifications to the committee for that purpose in the judicial district in which he resides. Being rejected by that committee, it is irregular for him to apply for examination to the committee in another district. An examination by a single member of the committee, though certificate of qualification be signed by two, is insufficient. A license granted under such circumstances will be revoked.

In the Supreme Court.

MR. C. E. GAST and MR. J. M. WALDRON, for the people.

MR. FRED BETTS, *pro se*.

RULE to show cause why the name of respondent should not be stricken from the roll of attorneys. The cause was heard upon motion to make the rule absolute. The answer to the petition, and the sworn answers of respondent to the interrogatories in the petition, being in, the opinion of the court was delivered by

HELM, J. The record in this case discloses the following facts, viz.: That in the month of October, 1883, respondent was examined by the examining committee

of the third judicial district for admission to the bar; that the committee declined to award him the requisite certificate of proficiency in legal attainments; that he attributed his rejection to the malice or prejudice of two members of the committee, and not to his own inefficiency; that in January, 1884, he made application to the examining committee of the sixth district, informing them of his former rejection, and averring by affidavit that he verily believed that he did not, and could not, receive a fair and impartial examination before the committee of the third district; that thereupon, after examination, a certificate of competency was given him by the said committee of the sixth district; that the examination of the latter committee was conducted solely by one member thereof, though the certificate was signed by two members; and that upon this certificate and the other essential credentials a license was issued by this court admitting respondent to the profession.

A motion is now submitted to make the rule to show cause absolute. The motion rests upon the petition and answer, together with the interrogatories attached to the petition, and sworn answers thereto by respondent.

Upon the record at this stage of the proceeding, we do not think the charge of *wilful* or *intentional* deceit in obtaining the license is sustained. The committee of the sixth district were informed of the steps previously taken, and we do not believe respondent intentionally withheld from this court knowledge of the matters above stated, which are now before us.

But the motion must be sustained on account of legal irregularities averred in the petition and admitted by respondent.

Section 71 of the General Statutes reads as follows:

"It shall be the duty of the supreme court to appoint a standing committee of three attorneys-at-law for each judicial district of the state, whose duty it shall be to examine all applicants for license as aforesaid, and if,

upon such examination, a majority of the committee shall deem the applicant qualified to practice as an attorney and counselor-at-law in the courts of this state, they shall sign a certificate to that effect, and transmit the same to the clerk of the supreme court."

This court is now, for the first time, called upon to give a partial construction to the foregoing section. Three questions are fairly presented, viz.:

First. May the applicant for admission to the bar, at his own option, and upon his own motion, go before the examining committee of another district than the one in which he resides, and has prosecuted his legal studies?

Second. Is he at liberty, after rejection by one committee, of his own accord to renew his application before another committee? and

Third. Is it sufficient compliance with the statute for one member of the examining committee alone to conduct the examination, the others accepting his conclusion and ratifying his recommendation without any personal knowledge of the applicant's fitness?

It is claimed in argument that the first and third of these questions have been affirmatively answered by examining committees themselves; this may be true; it certainly is true in the case before us. Such procedure, if existing to any extent, owes its adoption to considerations of hardship and inconvenience. But we doubt if it should be perpetuated.

A fair and reasonable interpretation of the law would seem to require the examination to be made by the committee of the district in which the applicant resides; the labor of those who serve upon these committees is entirely gratuitous, and it would be unreasonable and unfair to impose upon one committee the duty of examining students from all parts of the state. One evident purpose of the statute is to divide and distribute this labor and responsibility. Again, it was hardly the legislative

intention to give each candidate the privilege of choosing from among the seven different committees, the one in his judgment most likely to favor his application; the one made up of acquaintances or personal friends, or perchance the one most lax in its method of examining, and in the attainments required.

It is not a compliance with the spirit of the law for one member of the committee alone to conduct the examination. The statute contemplates that at least two of them shall pass in judgment upon the applicant's legal accomplishments; also, that they shall do this from personal investigation, and not by proxy. The examination of an individual committeeman may be thorough and satisfactory, and his conclusions in the premises may be eminently just and accurate, but its acceptance and indorsement by his associates is not sufficient; the result is, that the license issues upon the opinion of a single member, while the law requires the concurring judgment of not less than two of them.

The statute does not in words prohibit a second application to another committee after examination and rejection by the first one. But the indorsement of such a practice by us would be pernicious and absurd; besides, it is in clear violation of the intent of the law makers. Candidates for admission to the bar are not always free from conceit; laboring under a delusion concerning their qualifications, they might inflict themselves upon one after another of the examining committees until they had gone the rounds of the entire state, unless a favorable verdict were sooner obtained. The impropriety and unreasonableness of allowing such a practice, even should the committees knowingly submit thereto, are too apparent to justify further argument.

If the applicant believes himself the victim of unfairness or prejudice at the hands of the committee in his own district, he should present his grievance to this court;

and if, upon investigation, we are satisfied that injustice has been done him, the wrong will be rectified in some appropriate way.

Had the court been advised of the foregoing irregularities, respondent's license would not have been issued. It now appears that there was no proper examination, and that the certificate of legal proficiency was not obtained in accordance with law.

For these reasons we have concluded to revoke the license. But this determination rests upon conclusions as to questions of practice, which are now announced for the first time; conclusions which, according to the assertions of counsel, conflict in some respects with the construction of the law heretofore adopted by a few of the examining committees; and while we disapprove of respondent's conduct, we recognize the fact that it is largely excusable. We are, therefore, disposed to say that he may at once renew his request for examination. Over seven months have passed since his rejection by the committee of the third district; during this time he has been prosecuting his legal studies, and the same examiners might now render a favorable decision. But under the circumstances, we are aware that it would be more satisfactory to this committee, and less embarrassing to respondent, if this examination be conducted by some one else. Hence, we have determined to select three other members of the Pueblo bar to perform the duty.

The rule to show cause is made absolute, and respondent's license revoked, but he is given leave to apply to a committee consisting of F. W. Pitkin, T. T. Player and Wm. M. Stone, who are hereby specially appointed to pass upon his legal attainments.

If the decision of the special committee above named be favorable, respondent may at once renew his application to this court for admission to the bar.

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7	458
136	294

OCTOBER TERM, 1884.

STONE V. O'BRIEN.

1. Where property is found by the officer in the actual custody of the person named in his execution, the levy thereon gives the officer lawful possession; and in such case a demand is an essential prerequisite to suit in replevin against the officer. But when the property is found in custody of a stranger to the writ, the officer's possession under his levy is wrongful and no demand is necessary.
2. Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible.

Appeal from County Court of Custer County.

THE case is stated in the opinion.

MR. GEO. S. ADAMS, for appellant.

MESSRS. BLACKBURN and DALE, for appellee.

HELM, J. Replevin by appellee against appellant Stone, constable, holding under execution levy; appellee claims ownership of the property in controversy; cause tried to the court without a jury.

The proofs show that the animal had been purchased from Payne, the judgment debtor, by appellee; that a change of possession took place at the time of the purchase; that it was redelivered to Payne, as appellee's agent, for certain specified purposes; that Payne held such possession for a long period and exercised the usual acts of ownership. That on the day appellant levied the execution, the animal was in the possession of Payne's partner; but that such possession was without the knowledge or consent of Payne. No demand was made of the

appellant before suit brought; and a reversal is asked upon this ground.

Had the property been found by the constable in the actual custody of the person named in the execution, his possession thereunder would have been lawful; in such case a demand would have been an essential prerequisite to the replevin suit. Wells on Replevin, sec. 368, and cases cited.

The foregoing rule would probably also apply had the partner been holding possession as the employee or agent, for such possession would be that of the principal. But this was not the case; Payne supposed that the mare had been placed in pasture according to his directions; the possession, therefore, at the time of levy, was in no sense that of an agent. Being in possession of one *not* named in the execution, the taking by the officer was wrongful, and no demand was necessary. Wells on Replevin, sec. 369, and cases.

A more difficult question presented relates to the rejection of certain testimony. While in possession of the mare, after the sale to appellee, Payne, the vendor, on several occasions, made statements to third parties concerning the ownership thereof; these declarations were offered by appellant for the purpose of establishing Payne's title to the animal, and sustaining his levy; they were not made when Payne retook possession after sale, nor at the time of execution levy, but on various occasions during the period between these two acts.

The ground upon which their admission in evidence was sought is that the possession of property is a *continuing* act; and that declarations concerning the ownership thereof by the party in possession are admissible as a part of the *res gestæ* of such act.

The attempt to apply this doctrine to the case at bar gives rise to the following question: "Can a defendant in replevin give, in support of his defense, declarations made by himself, the plaintiff not being present, to third par-

ties, in favor of his own title to the property, while in possession thereof; both himself and the plaintiff asserting a right to the property, by virtue of ownership, and the issue being, to which does the property actually belong?"

It is true, the nominal defendant in this case is the constable, and not the party making the declarations; but the interest held under or through the execution levy was exactly the interest owned by Payne, the judgment debtor; no title could be levied on or sold, save and except that belonging to him; and the constable is in no better position, so far as the declarations under consideration are concerned, than Payne would be were he defendant in the action.

If these declarations were admissible, it was because—as claimed by appellant—they were a part of the *res gestæ* of the act of continuous possession.

There are cases which, upon superficial reading, seem to carry the doctrine of *res gestæ* to this extent; and there is at least one case in which this application of it was made. *Robeke v. Andrews*, 26 Wis. 311. But we are not prepared to admit that mere possession alone may properly be termed *an act* so as to justify the application of this branch of the doctrine of *res gestæ*.

The correct rule in this connection, certainly the safer and more equitable one, we conceive to be the following:

"Declarations of the party in possession, *explanatory of the possession, or explanatory of the title he is claiming*," may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are "proof only that such was the *character of the possession*, or such was the *title claimed*;" they are no evidence of the title actually held; and where the issue is, not what was the *nature of the possession*, nor what was the *title claimed*, but which party, plaintiff or defendant, was the *actual owner*, such declarations are not admissible.

See dissenting opinions of Dixon, C. J., in *Robeke v. Andrews, supra*.

The instances under this rule when the declarations should be received, are where the *character* of the possession or *nature* of the *claim made*, "becomes material with a view to the determination of some ulterior question;" as, for instance, cases in which a right rests upon the statute of limitations, and it is necessary to show that the possession was adverse.

To say that in a case where the only issue is actual ownership, a party may support his title by proof of his own declarations to third persons on sundry occasions, not in the presence of the other claimant, is to declare that one may manufacture evidence for himself. The injustice of the rule contended for in this case becomes more apparent when we remember that the statements of A. proclaiming his ownership would be received, while those of B. declaring *his* title would be promptly rejected; possession being the test of admissibility; A., having hired or borrowed the horse from B., may support his fraudulent pretense of ownership by the testimony of numerous reputable citizens as to his declarations; while B., the real owner, may not call a single witness to prove what he has said on the subject, because, having loaned the animal to A., he was not in possession when he made the statements.

Declarations by a party in possession, against interest or in disparagement of title, are admissible under a different rule from the one we are now considering.

For a full discussion of this question, and careful collection and review of the cases, see the able dissenting opinions in *Robeke v. Andrews, supra*.

The court did not err in rejecting the declarations of Payne.

Appellant should, perhaps, have been permitted to answer the question as to who "pointed out the mare as Payne's property" at the time he levied upon her

under the execution; it may be that this evidence was proper as a part of the *res gestæ* of the act of making the levy; though there is doubt upon this question, we do not decide it; from the record it appears that appellee was not present, and the rejection of a statement made by some third person in his absence would not, even if erroneous, be sufficient in itself to justify a reversal of this case.

The judgment of the county court will be affirmed.

Affirmed.

THE PEOPLE EX REL. BARNES ET AL. V. THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT ET AL.

PETITION for writ of prohibition.

STONE, J. This is an original application to this court by petition for a writ of prohibition to restrain the further action of the district court of the fourth judicial district and others from further proceeding in the matter of a temporary injunction issued by the judge of said court, and to prevent the appointment of a receiver by said court in respect to certain property and matters in litigation in a certain suit then pending in this court, entitled R. L. De Lay and others, appellants, against The Leadville Improvement Company, appellee, numbered 1091 on the docket of this court, and to restrain all further proceedings under and by virtue of the order of the judge of the district court aforesaid in granting the said temporary writ of injunction, etc.

An inspection of the records of this court discloses the fact that, subsequent to the filing of the petition for the said writ of prohibition, and the answer thereto, to wit, on the 4th day of December, A. D. 1883, an order was entered in this court in the words following, to wit:

“R. L. De Lay et al., appellants, v. The Leadville Im-

provement Company, appellee. Appeal from district court of Lake county. At this day, this cause coming on to be heard upon the motion of said appellee and written stipulation of parties filed herein, it is ordered by the court, in pursuance of said stipulation, that the injunction heretofore issued in this cause be, and the same is hereby, dissolved, without prejudice; and that the judgment of said district court be, and the same is hereby, affirmed at the cost of said appellants. It is further ordered by the court that both parties have leave to withdraw from the files the abstract of title and other title papers heretofore filed herein."

The judgment of the district court above referred to as affirmed by the foregoing order is the judgment of the district court of Lake county, from which the appeal was taken to this court, but the injunction in question was issued by the judge of the fourth judicial district upon an application therefor, by reason that the judge of the Lake district court, who was presiding at the time of the making of the application for injunction, had previously been of counsel in the case, and, therefore, said application was made to the judge of the fourth district, who thereafter allowed the temporary writ to go; and the petition to this court for the writ of prohibition was based upon the ground of want of jurisdiction in the district court or judge thereof to interfere in the case while the same was pending on appeal in the supreme court.

From this state of facts it is obvious that the order of this court dissolving the injunction, and determining the principal case by affirming the judgment therein of the Lake county court, from which the case was appealed to this court, has also accomplished all that was sought by the petition in the case now before us, and the said petition will therefore be ordered dismissed at the cost of the relators.

Petition dismissed.

BARTH ET AL. V. JONES ET AL.

Where there is direct conflict in the evidence, it is the province of the jury to determine to whom credit should be given, and the verdict, not being clearly opposed to the weight of evidence, will not be disturbed.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. HARMAN and ELLIS, for appellants.

Messrs. BROWNE and PUTNAM, for appellees.

BECK, C. J. The appellants, Barth & Bro., on the 8th day of October, A. D. 1880, leased to the appellees, Thomas and Robert Jones, for the term of three years, a certain lot and premises in the city of Denver, to be used in establishing and carrying on the grocery business.

By the terms of the lease certain improvements were to be made by the lessors, and possession was to be delivered to the lessees on the 1st day of November following. Lessees were to pay \$200 per month as rent for the premises, monthly in advance, and at the time of making the contract paid thereon the sum of \$240 in full for the month of November.

The premises were not ready for occupation at the stipulated time, and the lessees, after demanding possession, and the lessors being unable to give it, hired other premises. This action was brought to recover back the money advanced upon the contract.

The defense is, that Barth & Bro. are under no legal obligation to refund the money advanced, since they expended a large sum of money in making the stipulated improvements, and that they were prevented from completing them by the time agreed upon, by the acts of Jones & Co., the lessees.

Also, that the lease was canceled by mutual consent

of the parties without any agreement to refund the money advanced.

Upon trial of the issues in the court below, Jones & Co. obtained a verdict and judgment for the sum of \$266, for the money advanced upon the lease and interest thereon.

At the conclusion of the plaintiffs' testimony on the trial, defendants moved the court for a non-suit, on the ground that the testimony showed a cancellation of the lease by agreement, no part of which required the refunding of any money. This motion was overruled, and the ruling being duly excepted to, now constitutes the first assignment of error.

Upon examination and consideration of the testimony adduced in behalf of the plaintiffs, we think the ruling of the court was correct. This testimony shows that the lease was abandoned by both parties, but it does not show that any agreement was reached concerning the money previously paid by Jones & Co.

The testimony of Robert N. Jones is to the effect that negotiations were abruptly broken off, without arriving at any agreement about this money. He says (speaking of the attempted negotiation with William Barth): "After he saw his brother * * * he said they had agreed to cancel the lease. After he agreed to cancel the lease, then said I, 'Mr. Barth, I want my money.' 'No,' said he, 'we can give you no money back,' and I left him there and then and took a house on Blake street."

This was the substance of all that passed at that interview. The lease was not produced. No release of the contract in writing was executed then, or at any other time.

The previous testimony of the witness shows a request on his part to be released from the contract, because Barth & Bro. could not deliver possession of the prem-

ises, and that William Barth said he would see his brother and then give him an answer.

Having seen his brother, he gave for answer that they had agreed to cancel the lease.

Up to this point nothing appears to have been said by either party about the \$240 previously paid on the lease. The fact that Barth promptly refused to pay it back, when it was then and there demanded by Jones, indicates strongly that a repayment of this money was not contemplated by the defendants in the announcement that they had agreed to cancel the lease.

The foregoing circumstances, coupled with the subsequent conduct of the parties, as detailed by the witnesses of the plaintiffs, show a default on the part of Barth & Bro. to comply with the terms of the lease on their part. They show a compliance and a demand of possession by the plaintiffs, and a subsequent abandonment, but not cancellation of the lease by the mutual consent of both parties. They likewise show that no agreement was reached concerning the money advanced by the plaintiffs.

There was no discharge from all the terms and conditions of the contract, as in the case of *Winton v. Spring*, 18 Cal. 452, cited by defendants' counsel. On the contrary, the legal effect of the plaintiffs' testimony is that the negotiations for cancellation were abruptly terminated by the demand and refusal to pay the \$240.

Upon this testimony there was a good cause of action against the defendants, for which reason the motion for non-suit was properly denied.

Respecting the other errors assigned, we discover no sufficient ground for reversing the judgment.

If the case was to be considered on the testimony of the defendants and their witnesses only, there would be no cause of action; but their testimony being in direct conflict with that of the plaintiffs, it was the province of the jury to determine to whom credit should be given.

The jury determined the conflict in favor of the plaintiffs below, and returned a verdict in their favor. We cannot say that this verdict is clearly opposed to the weight of the evidence. It was found under proper instructions as to the law governing the case, and this court would not be warranted, under the circumstances, in disturbing it. The judgment is affirmed.

Affirmed.

THE BOARD OF COMMISSIONERS OF GUNNISON COUNTY V.
OWEN ET AL.

1. The provision in the statute (Laws 1879, p. 159, sec. 1), concerning taxes for road purposes, exempting from such taxes all property within the limits of incorporated towns or cities, is in conflict with sections 8 and 6 of article X of the state constitution, and is therefore void.
2. Had the legislature undertaken to commute this tax for an equivalent burden to be borne by cities and towns, or provided that the tax collected from property within such corporations should be expended on the streets thereof, or declared that a similar and equal tax should be collected and expended therein, the objection might have been obviated.
3. The unconstitutionality of one part of a statute does not necessarily render the residue thereof void.

Appeal from County Court of Gunnison County.

THE case is stated in the opinion.

Messrs. HELMS and BROWN and Mr. THOS. C. BROWN, for appellant.

Mr. W. D. BECKETT and Messrs. ROGERS and CUTHBERT, for appellee.

HELM, J. By the single assignment of error presented in this case, we are called upon to determine the constitutionality of section 1 of an act to amend chapter 88 of the General Laws.

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This amended section reads as follows: "The board of county commissioners of the respective counties of the state may levy a property tax for road purposes, which shall not exceed \$1 on each \$100, to be levied and collected in the same manner and at the same time as other property taxes are levied and collected in each year; but all property included within the limits of incorporated towns or cities shall not be subject to the tax." Session Laws 1879, p. 159.

This action was brought, and must be determined, under the laws on the subject as they existed prior to 1883.

It is contended, and the county court held, that the last clause of the foregoing statute is void, because it is in violation of sections 3 and 6 of art. X of the state constitution. The former section of this instrument provides that: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," etc. * * *

The latter declares that "all laws exempting from taxation property other than that hereinbefore mentioned, shall be void."

The property relieved from the road tax by the act of 1879 is not among the exemptions above referred to.

In this state there is no township organization; neither is there any road districting within the county, such as exists in some of the other states. By statute, the county commissioners are commanded to divide their respective counties into suitable road districts. But this division of the county has no bearing or effect whatever upon the assessment and collection of the property tax in question, except that the district overseers perform certain duties when the same is delinquent. The county commissioners control exclusively the assessment thereof throughout the entire county; they also apportion and disburse the revenue therefrom as in their judgment is for the best interests of all the citizens of the county;

the collection thereof is made in the same manner and by the same officers as that of other county taxes. In short, under our laws, for the purpose of assessing, collecting and disbursing the "property tax for road purposes," each county constitutes but a single road district.

The county commissioners are "the authority levying the tax;" the boundaries of the county are the "territorial limits" of the "authority levying the tax."

The tax under consideration is strictly an *ad valorem* charge, and must be "uniform" upon all property within the county not exempt from taxation.

But realty and personalty within the corporate limits of a city or town are as much a part of the taxable property of the county as are farms and chattels outside such corporate limits. There seems to be no escape from the conclusion that a legislative declaration entirely exempting the former from payment of the tax in question is in conflict with the constitutional inhibition, and, therefore, void.

In Illinois this view was adopted with reference to the power of township authorities to levy a similar tax upon property within a city located in the township. *O'Kane v. Treat et al.* 25 Ill. 557. See *Fletcher v. Oliver*, 25 Ark. 289; *Wilson v. Supervisors of Sutter County*, 47 Cal. 91.

Had the effort been made to relieve property within towns and cities from bearing its proportion of the cost of constructing a court-house or other county building, there would probably have been no dispute as to the unconstitutionality of the statute. But it is argued that the city has to construct, and keep in repair, its streets, bridges and culverts; that for the expenses thus incurred only property within the corporate limits is answerable, and therefore that it is inequitable to tax this property for the maintenance of the county highways.

We may agree with counsel upon these propositions, and we may venture the opinion that the legislative intent, in the provision we are now considering, is be-

neficient and wise. But our answer to the argument must be, that the exemption, *as declared* in the statute, is forbidden by the constitution, and we should not, by misconstruction of the latter instrument, attempt to do away with the apparent injustice.

Had the legislature undertaken to commute this tax for an equivalent burden to be borne by the towns and cities, or had it declared that the tax thus collected from property within such corporations should be expended upon the streets thereof, or that a similar or equal tax should be collected and expended, the objection might have been obviated. See *Baird et al. v. The People*, 83 Ill. 387; *Cooper v. Ash*, 76 id. 17. And it is possible that if the statute prohibited the collection of this tax upon property within towns and cities which "levy such taxes for the streets and alleys thereof," a different conclusion might be reached. See *Martin v. Aston*, 60 Cal. 63. Construing the law as we find it, however, we are constrained to hold the latter part of it void.

But the unconstitutionality of one provision in a statute does not necessarily render the entire statute or section void. *Trippe v. Overacker et al.* (*ante*, page 72), and citations.

If, from the amended section of 1879, before us, the objectionable sentence were stricken out, a perfect law would remain; there would be left the identical statute adopted by the legislature of 1877. We do not feel justified in concluding that the legislature intended to have the whole section stand or fall with the exemption provision subsequently added. We think the valid portions thereof are not so "connected with" or "dependent upon" the void provision as to fall with it.

The statute may be regarded as if no such amendment or addition existed.

The county commissioners of Gunnison county did not so interpret and apply the law, however, and therefore the judgment in this case must be affirmed.

Affirmed.

TOENNIGES V. DRAKE ET AL.

Under the statutes of this state the service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity.

Error to County Court of Gunnison County.

THE facts are stated in the opinion.

Messrs. THOMAS, McDOUGAL and THOMAS, for plaintiff in error.

Messrs. ABERCROMBIE and HAWLEY, for defendants in error.

BECK, C. J. The principal question submitted for adjudication in this case is whether, under our statute, a plaintiff can serve his own summons.

The record discloses that Drake, one of the plaintiffs below, was specially appointed by the sheriff of Gunnison county to serve the summons in this case, and that he did serve and return the same in manner specified in the Civil Code.

The provision referred to is as follows:

“The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought. When the summons is served by the sheriff or his deputy, it shall be returned with the certificate of the officer of its service to the office of the clerk from which the summons issued. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of said person of its service.” Civil Code Comp. 1883, page 13, sec. 39.

It is provided in the General Statutes that whenever the sheriff shall be a party to a cause, or whenever an

affidavit is made and filed with the clerk, by a party to a litigation, that he believes the sheriff would not, by reason of partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit, the coroner shall execute process of every kind therein. General Statutes 1883, secs. 613, 614.

The plaintiff not being prohibited from serving his summons by the express letter of the statutes, it is contended that the authority conferred upon a sheriff to specially appoint a person to serve the writ authorizes him to appoint the plaintiff in the action.

We do not think this position is sound. Our statute, when its several provisions are considered together, is found to be but declaratory of the common law rules upon the subject. Under these rules all writs and processes were regularly delivered to the sheriff for service, and he was sworn to execute the same without favor, dread or corruption.

Nevertheless, if the sheriff was partial, by reason of consanguinity or affinity, or if he was under the power of either party, or if he was himself a party to the action, so that he could not be presumed indifferent in the service and return of the writ, the process was directed to the coroner. If the coroner was partial or not indifferent in the matter, two persons called elisors, against whom no cause of challenge existed, were named by the court to execute the process. 8 Bacon's Abr. pp. 689, 690.

A careful consideration of the various provisions of the statutes of this state renders it apparent that it was the intention of the framers to insure to litigants the same rights that were secured by the rules of the common law, to wit: that all process be served by disinterested and impartial officers or persons. This intention would certainly be defeated by the construction contended for.

It is clear, upon principle, that the same causes which should disqualify a sworn officer from serving a writ should equally disqualify a private person.

It would involve an absurdity to say that a party to a suit shall be protected against the presumed partiality of a regularly commissioned and sworn officer of the court, arising either from his interest in the subject-matter of litigation as a party thereto, or from other causes, and at the same time be exposed to the partial, prejudiced or corrupt official action of any other person or party obnoxious to the same objections.

The statute does not say that a plaintiff may execute his own writ, and principle, reason and authority alike forbid such a construction.

The code of Mississippi (Revised Code 1871, sec. 257) provides that if the sheriff be a party or interested in any suit, or for other just cause is rendered incapable or unfit to execute his office in any particular case, the coroner shall perform the duties of sheriff, and execute all writs. Under this statute, in the case of *Dyson v. Baker*, 54 Miss. 24, wherein a plaintiff had been specially deputized by the sheriff to execute a writ of attachment in his own case, the court held that both the officers of the court and private persons were disqualified to execute process in cases wherein they were parties or interested.

The case of *Filkins v. O'Sullivan*, 79 Ill. 524, is very similar, in all respects, to the one under consideration.

The statutes of Illinois of 1869 (Laws 1869, p. 399) authorized the sheriff to appoint a special deputy to serve any process issuing out of a court of record, by indorsing the appointment on the writ.

The person so appointed was required to serve the writ by reading the same, and delivering to the defendant a copy thereof, and the return was to be made under oath.

The plaintiff in the above case was deputized to serve the summons. The court said this was error; that a party could not serve his own writ. On account of this error, and of a defective return of the writ, it was held that the court below acquired no jurisdiction of the person of the defendant.

Counsel for defendants in error in the present case call our attention to the fact that the provisions of the New York code forbid a party to the action to serve a summons in any case. They then cite the cases of *Myer v. Overton*, 4 E. D. Smith, 428, and *Hunter v. Lester*, 18 How. Pr. p. 347, as establishing the doctrine that if a plaintiff *does* serve his own summons, it is only deemed an irregularity, and is cured by judgment.

We cannot approve this doctrine. Where a plaintiff is disqualified by statute to perform an official act necessary to give the court jurisdiction over the person of the defendant, as in cases referred to by counsel, to hold that if he does perform such act, and the court proceeds in the absence of the defendant to render judgment by default against the defendant, the defect is cured and the judgment must stand, would seem to fritter away, by construction, the protection against frauds intended to be secured to suitors by the statute.

The last mentioned cases hold, however, that if the defendant appears before judgment and moves to quash the return, limiting his appearance for the purposes of the motion, the error may be corrected.

That was the course adopted by the defendant below in this case, and the refusal of the court to quash the return of service is the principal error assigned. This ruling would seem to have been erroneous even under the authority just cited.

We are of opinion that the service of a summons by a plaintiff in the cause is void, and that a judgment entered in the absence of the defendant and upon such service is a nullity.

The judgment is reversed and the cause remanded, with instructions to the clerk of the court below to issue an *alias* writ of summons.

Reversed.

THE PEOPLE EX REL. MILLS V. JOBS.

7	475
23	309

1. A special charter granted to a municipal corporation before the adoption of the constitution is not abrogated by that instrument unless in conflict therewith.
2. The office of police judge, with jurisdiction to enforce town ordinances, is authorized by section 1, article VI, of the constitution.
3. The unconstitutionality of one part of a statute does not necessarily render the whole of the statute void.

Error to District Court of Clear Creek County.

THIS was an action brought to determine whether the office of police judge, provided for by the charter of Georgetown, was abrogated by the subsequent adoption of the constitution.

Mr. W. T. HUGHES, for plaintiff in error.

Messrs. MORRISON and FILLIUS, for defendant in error.

HELM, J. The demurrer in this case was properly sustained. Under the legislative enactments existing, of which this court takes judicial notice, the complaint does not state a cause of action.

The charter of Georgetown became a law prior to the adoption of the constitution; so far, therefore, as not inconsistent with the latter instrument, this charter remained in force after the adoption thereof.

The fact that it is local or special legislation does not, under the circumstances, affect its validity. *The People ex rel. v. Commissioners of Grand County*, 6 Col. 202.

Relator claims that the declaration in this charter clothing the police judge of Georgetown with power to act as a justice of the peace for the entire precinct, is void; he argues that it is inconsistent with one of the constitutional provisions relating to justices of the peace.

The correctness of relator's position might be conceded. For the purposes of this case, however, it is unnecessary

to decide the question. If we assume that he is right, it by no means follows that the charter is void wherein it created the office of police judge and clothes him with power to dispose of cases arising under the town ordinances.

The two offices and jurisdictions are entirely distinct; the provisions relating thereto are in no way dependent upon each other. The principal purpose of the legislature unquestionably was to create the office of police judge, and give the person elected thereto power to punish for violations of the town ordinances; to this extent, the provision is not in the slightest degree inconsistent with the constitution; on the contrary, that instrument authorizes the creation of this office. See art. VI, sec. 1.

Since, therefore, the objection of special legislation is not good, so far the charter provision under consideration is perfectly valid. The addition thereto of a clause authorizing the police judge to fill the office and perform the duties of justice of the peace, would not, even if such extension of power were obnoxious to the constitution, render the whole section void; such addition might be regarded as surplusage.

This is clearly one of those cases where the valid enactment does not fall with the void provision, if such there be. *Trippe v. Overacker* (*ante*, page 72); *The Board of Co. Comm'rs v. Owen*, *ante*, page 467. The complaint declares that respondent disclaims the right to fill the position and discharge the duties of justice of the peace; it charges him only with occupying the office and performing the duties of police judge as provided in the town charter. It entirely fails to state facts showing a usurpation of the latter position by him.

Relator's argument questions the *existence* of the office; he does not contend that if there is a *de jure* office, his complaint is sufficient to impeach respondent's right to fill it.

The fact that respondent is also authorized to preside

at the meetings of the selectmen, and to exercise other powers usually devolved upon the mayor, is not material. Georgetown has, under the charter, no mayor, and we are aware of no constitutional declaration which renders void the prior territorial legislative enactment requiring the police judge to fill this office also, and perform the duties connected therewith.

The foregoing conclusions render unnecessary a discussion of the further questions presented.

The judgment will be

Affirmed.

IRWINE ET AL. V. WOOD ET AL.

1. A demurrer for misjoinder of parties must, under the code, state specifically in what the misjoinder consists.
2. Upon a contract expressing a several liability of the defendants, they may, under the code, be joined in an action thereon. This construction is in accord with the reform spirit and express purpose of the code practice.
3. A separate judgment may be proper, and may, in some cases, be necessary, whenever a several suit might have been brought.

Appeal from District Court of Gunnison County.

THE case is stated in the opinion.

Messrs. THOMAS, McDUGAL and THOMAS, for appellants.

Messrs. BELFORD and REED, for appellees.

STONE, J. The point relied upon by appellants for reversal of the judgment is, that the court erred in sustaining the demurrer to the complaint, on the ground of misjoinder of the defendants.

The suit was upon a written contract, one clause of which was as follows: "That the said Burchinell, Wood and Clark, parties of the first part (each for himself and

7	477
18	288
7	477
10a	248
7	477
33	62

not for the others, and in so far as his interest may appear in said claims), agree to furnish provisions to said Irwine and Jerome, the parties of the second part to this contract," etc.

The complaint was demurred to on the ground (among others) of a misjoinder of parties defendant, and the demurrer was sustained by the court upon that ground expressly. We think this was error. Section 56 of the code (Revision of 1883) provides that a demurrer may be disregarded which does not distinctly specify the grounds upon which any of the objections to the complaint are taken.

I. In this case the demurrer should have specified in what the misjoinder consisted; which of the parties defendant were misjoined, and why; since it was on the ground alone that a joint action would not lie, it must be admitted, nevertheless, that under the code practice the action was good against some one of the defendants; at least, if the complaint set out a good cause of action against any one of the defendants, a joint demurrer by all on the ground of misjoinder was bad. Pomeroy, Rem. secs. 289, 290, 291.

II. The ground in support of the demurrer presented in argument, and upon which the court below appears to have sustained it, is that the contract, which was the foundation of the action, expressed a several liability of the defendants, and that therefore they could not be joined in the same action.

The only authorities cited in support of the ruling of the court upon this point are those under the practice at common law. This rule of practice has been swept away by the Codes of Civil Procedure in most of the states where the code practice prevails. Section 13 of our own code (Revision of 1883) declares that "*Persons jointly or severally* liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments,

may all, or any of them, be included in the same action at the option of the plaintiff."

The case of *Wilde & Co. v. Haycraft et al.* 2 Duvall (Ky.), 309, where the contract was a guaranty, in which the defendants each expressly bound himself in a separate liability for a specific amount less than the aggregate sum of the guaranty, is in point. The defendants were all joined in one action upon the contract, and the petition was dismissed in the court below upon a demurrer specifying, among other causes, that a joint suit could not be maintained. The supreme court reversed the judgment, and in passing upon this point, under a provision of the Civil Code of that state (Kentucky), substantially the same as the one quoted from our own, say:

"In this case there is but one contract, and it is the same contract, between the same parties, but several as to its obligations; and neither the language nor the presumed object of the quoted section of the code can be constructively restricted to a several contract binding each separate obligor for the whole amount of their aggregate liabilities. The letter of the section certainly authorizes no such restriction, and the policy of avoiding a vexatious multiplicity of actions for a breach of the same contract would apply equally to every contract made at one and the same time by the same parties, severally liable upon it. The joint action as chosen is, therefore, in our opinion, a proper legal remedy."

That the same construction is given to similar provisions of the Codes of Procedure of other states, see the following cases: *Decker v. Trilling et al.* 24 Wis. 610; *The State ex rel. etc. v. Roberts*, 40 Ind. 452; *The People v. Lone et al.* 25 Cal. 520; *Parker v. Jackson*, 16 Barb. 33; Pomeroy's Remedies, sec. 292.

This construction of the provision in question is undoubtedly in accord with the reform spirit and express purpose of the code practice in seeking to avoid the multiplicity of suits under the former practice, wherever the

respective rights and liabilities of parties arising out of the same contract might as justly, conveniently, and with less expense, be determined in one action as in two or more.

In the case at bar, the liabilities of each and all of the parties joined as defendants arise out of the same contract embodied in the one instrument of writing as averred by the complaint, and the latter, therefore, was not obnoxious to the demurrer on the ground of misjoinder of parties.

III. As the case will be remanded for trial, it is not out of place to observe that if the trial should eventuate in a judgment against the defendants, a separate judgment against each found liable would be proper, inasmuch as the liability of each is expressed in the contract to be not only several but differing in extent, proportionate to the respective and different interest of each in the property specified. Civil Code, secs. 199, 200 (Rev. 1883).

A several judgment is proper, it seems, and may in some cases be necessary, whenever a several suit might have been brought. *Parker v. Jackson*, 16 Barb. 33; *Decker v. Trilling*, 24 Wis. 610; *People v. Edwards*, 9 Cal. 286.

The judgment is reversed and the cause remanded.

Reversed.

7	490
15	261
16	380

REITHMAN V. BRANDENBURG.

1. Section 1498 of the General Statutes, regarding the change in the terms of a lease, applies to tenancies from month to month, and not to a tenancy for one month.
2. A tenant of demised premises holding over is deemed in law to hold as tenant at the same rent previously paid, if there be no new agreement. But if he has notice from his landlord that, in case he retains possession, he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to such increased rental.

Error to County Court of Arapahoe County.

THE case is stated in the opinion.

Mr. JAMES H. BROWN, for plaintiff in error.

Messrs. WALDHEIMER and JENKINS and Mr. L. C. ROCKWELL, for defendant in error.

HELM, J. The tenancy averred and proven by plaintiff in the court below was for a single month; it was not a tenancy "from month to month," within the meaning of section 1493 of the General Statutes. The provisions, therefore, of this section regarding a change in the terms of lease, have no application to the contract now under consideration. *Stopplekamp v. Mangeot*, 42 Cal. 316.

If plaintiff's action had been brought under this provision it could not be maintained; for the notice served upon defendant was not a proper compliance therewith. It is not, and was not intended to be, a "notice to quit," under section 1504 of the General Statutes.

Plaintiff contends that, in view of the proviso embodied in the latter statute, no notice was necessary to terminate the tenancy existing in this case. His position is that this tenancy was, by contract, to end on a day certain, viz., July 31st; that thereafter he was entitled to the possession without notice; that he then had the right, independently of statute, to let the premises to another, or relet them to defendant on such terms as defendant and himself might mutually agree upon; and that his notice to defendant on the 21st of July was in the nature of a proposition which, by defendant's consent and acquiescence, became binding upon him as a new contract for the month of August.

We are inclined to agree with plaintiff in error in these conclusions. There is no dispute but that the original entry and continued possession of defendant was that of a tenant; and the relation of landlord and tenant existed between the parties during the month of August.

The notice in this case was not formal as a proposition

for a new contract, but it was sufficient to advise defendant that, if he held over after the expiration of the lease, he must pay an increased rental. He made no objection whatever to the increase proposed, quietly remained in possession during the month of August, and must be held to have accepted the conditions of the new contract.

The law on this subject is, in our judgment, correctly stated as follows:

“A tenant of demised premises, holding over after the expiration of his term, is deemed, in law, to hold over as tenant at the same rent he had previously paid, *if no new agreement is made*. But if he has notice from the landlord that, if he retains possession, he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to pay such increased rent.” *Mack v. Burt*, 5 Hun, 28, and cases cited. See, also, *Higgins v. Halligan*, 46 Ill. 173; *Hunt v. Bailey*, 39 Mo. 257; *Griffin v. Knisely*, 75 Ill. 41; *Hoff v. Baum*, 21 Cal. 121; *Roberts v. Howard*, 14 E. C. L. R. 648.

A difference will be observed among some of the foregoing cases upon an allied question not here presented. In *Hunt v. Bailey*, it seems to be held that if, upon receipt of the notice, the tenant objects to the terms increasing his rent, and indicates an intention not to pay, although he continues to hold the possession of the premises without any further correspondence with his landlord, he will not be liable for such increase; while in *Griffin v. Knisely*, the court declare that by such continued possession after objection, he will be deemed to have changed his mind and acceded to the new condition.

No such objection was made by defendant until the month expired, and, therefore, we are not now required to express an opinion upon this particular question.

The situation of defendant in the case before us is analogous to that of one who, “contemplating entering into possession of the lands of another, to occupy for use, is informed by the lessor that he can do so upon

terms stated, * * * and the party thereafter makes entry, occupies and uses the land."

Upon principle, the same rule should govern both cases. But this court has said, in the latter case, that "it is a good acceptance of the terms proposed, and he will become thereby bound, under an implied contract, to pay the sum named." *Dickson v. Moffat*, 5 Col. 114.

As already suggested by the pleadings and proofs, we are advised that plaintiff is treating defendant as a tenant under an implied contract of rental. Upon the expiration of the lease for July, plaintiff elected not to regard defendant as a trespasser, but to continue the tenancy under the new conditions theretofore proposed.

Entertaining these views, it follows that we must reverse and remand the cause.

Reversed.

HERFORD V. CRAMER.

1. An affidavit in attachment, stating as ground therefor "that the demand is due on express contract for the direct payment of money, to wit, upon three several promissory notes now overdue," and giving the amount, *held* a good ground of attachment under the fourteenth subdivision of the attachment act.
2. The connected structure of a pleading cannot be destroyed or disjoined at the pleasure of the pleader, and its disconnected averments separately demurred to.
3. A pleading, to be subject to demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say — taking all the facts to be admitted — that they furnish no cause of action whatever.
4. Upon discovery of fraud in a contract of sale, the vendee has his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages, either by original action or as a counterclaim to an action against him for the purchase money brought by the party committing the fraud.
5. It is well settled that the good will of a business may have a property value and form the subject-matter of a contract and sale; and the contract being an entirety, for the stock and good will, the

7	483
10	283
7	483
13	566
13	566
7	483
13	196
7	483
2a	3
7	483
116a	164
7	483
119a	291
19a	388

vendor may not relieve himself of liability by proving that the stock was worth the amount of the purchase money.

6. If the property sold is more valuable than the consideration expressed in the contract, the profits of the bargain legitimately belong to the purchaser.
7. The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property is the same. It is to ascertain the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be.
8. In alleging damages it is only necessary to particularly specify the items, when the damages claimed are not the direct and necessary consequence of the wrong complained of.
9. In this case held that the fact that the demands sued on were assigned to plaintiff does not exonerate him. It is charged that the false representations were made by him, and he must be held personally responsible for the consequences.

Error to County Court of Lake County.

THE facts are stated in the opinion.

Mr. A. S. WESTON, for plaintiff in error, *ex parte*.

BECK, C. J. This case is submitted *ex parte* by plaintiff in error upon a rather meager brief, considering the fact that the points raised involve important questions of practice.

The first error assigned is, that the court erred in issuing an attachment on an insufficient affidavit.

The affidavit was made under the *fourteenth* subdivision of the attachment law (Civil Code, 1883, p. 30), and merely states as ground for attachment, that the demand is due on express contract "for the direct payment of money, to wit, upon three several promissory notes now overdue, amounting to the sum of \$1,797.50, besides interest."

The *quære* suggested is, whether it is sufficient to authorize the issuing of a writ of attachment, that the affidavit state merely the ground mentioned in this *fourteenth* subdivision of the act, or whether some other ground must not be stated?

This question was passed upon by this court at the December term last, in the case of *Simmons v. California Powder Co.* (*ante*, p. 285), wherein it was held that notwithstanding the awkwardness of the phraseology, and the misplacing of said *fourteenth* subdivision in the attachment act, and the error in numbering, it was intended to define a separate and additional cause of attachment.

The *first* error, therefore, is not well assigned.

The *second* and *third* errors assigned are more serious. They question the rulings of the court below in sustaining the plaintiff's demurrer to portions of the defendant's answer.

A brief summary of the pleadings is necessary to an understanding of the points involved.

The plaintiff below, Joseph C. Cramer, sued the defendant, Lewis Herford, upon three promissory notes, one for the sum of \$1,000, payable to David Ringle, and signed by both defendant and plaintiff.

The other two notes were for the sum of \$500 each, were payable to the order of J. C. Cramer & Co., and were signed by the defendant only.

The complaint alleges that the plaintiff signed the first note as security for the defendant, to enable the latter to borrow of the payee the sum of \$1,000; that the defendant paid the accrued interest thereon, less the sum of \$15, and no more; and that the plaintiff was compelled to pay the principal sum and balance of interest, and now holds the note, etc.; that the two \$500 notes were transferred to him by the firm of J. C. Cramer & Co., and that plaintiff is the owner thereof.

The portion of the answer covered by the *first* and *second* grounds of demurrer alleges, in substance, that the obligations mentioned were executed by the defendant in consideration of an agreement entered into between him and the firm of J. C. Cramer & Co., whereby the said firm sold and transferred to the defendant their en-

tire water-cart outfit, together with the good will of the water-supplying business theretofore carried on by said J. C. Cramer & Co., in the city of Leadville. The property used in connection with the business consisted of seven water carts, fourteen horses and necessary equipments. By the terms of the agreement the defendant became obligated to pay for said business and property the sum of \$4,500.

He alleges that he was induced to enter into this agreement by means of representations made to him by the plaintiff, J. C. Cramer, that the business was paying his firm \$600 per month, clear of running expenses; that it would pay the defendant at the same rate, clear of running expenses, and that defendant could easily pay for the property out of the net proceeds of the business, before the maturity of the notes for the purchase money.

Defendant alleges that these representations were false and fraudulent, and were wilfully made by the plaintiff for the purpose of defrauding and injuring him; that the property and business did not pay anything above running expenses, either to the firm of J. C. Cramer & Co. or to the defendant, and that it was incapable of being made to pay any more.

He avers that the \$1,000 note was executed for the purpose of obtaining a loan of the sum mentioned, to be applied as a cash payment upon the contract, and that it was obtained and paid over to the said firm, and that the plaintiff and his copartners had the full benefit thereof. He further states it was part of the agreement with said firm that the plaintiff should execute said note as surety.

The defendant avers that he was induced to execute said note, for the purpose of procuring the loan aforesaid, by the false and fraudulent representations of the plaintiff, and that he was induced to execute the two \$500 notes by the same fraudulent conduct, and that in consequence of said fraudulent representations he has been injured in the sum of \$2,000.

A demurrer was sustained to this portion of the answer, and the defendant elected to stand by the answer.

The correctness of this ruling is now questioned by the *second* and *third* assignments of error.

There was a trial upon an issue raised upon another portion of the answer, which set up a different ground of defense, and a finding and judgment for the plaintiff.

We are not advised wherein the defense or counterclaim stated was supposed by the court to be defective, save by the demurrer itself, which says, referring to a part of the defense, designated by certain words and lines, "that the same does not state facts sufficient to constitute a cause of action, nor does the same constitute any defense to plaintiff's cause of action, or to any of the causes of action set forth in plaintiff's complaint."

The residue of this defense is separately demurred to upon the same grounds.

We observe, in the first place, that whatever defects may exist in the portion of the answer under consideration, the demurrer is still more defective. The attempt thus made to separate the averments descriptive of the fraud practiced upon the defendant into two distinct offenses, seems to be wholly without pretext. This portion of the answer does not purport to state two grounds of defense, but the single ground that the defendant was induced to enter into the contract of purchase through fraud, and that he has been injured thereby in the sum stated.

Treating it, however, as two distinct defenses, the language of the demurrer is, "comes now the said plaintiff and demurs to all that part of the defendant's said answer made and filed herein, from and including the fourteenth line," etc., and assigning the ground of demurrer above stated. It then proceeds: "And the said plaintiff, further demurring to said answer, demurs to all that part of the said answer from and including the words 'that

said note,' in line number ten," etc., and concludes with the same objection above stated.

The connected structure of a pleading cannot thus be destroyed or disjoined at the pleasure of a pleader, and its disconnected averments separately demurred to. Such a practice is not to be tolerated.

We will, however, proceed to inquire whether this portion of the answer contained sufficient facts to constitute a cause of action or ground of defense.

In Bliss upon Code Pleading, sec. 425, it is said of a demurrer for the objection here made, that the pleading to be subject to demurrer "must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say — taking all the facts to be admitted — that they furnish no cause of action whatever."

Now, regarding the averments of the answer to be true, there is presented as a counterclaim to the cause of action, the following facts:

The defendant was induced, by representations made by the plaintiff, to purchase what he was led to believe was a highly remunerative business, obligating himself to pay therefor, together with the stock necessary to operate the same, the sum of \$4,500. The representations were not true, and the plaintiff knew them to be false when he made them. He represented that the business was paying his firm, and would pay the defendant, \$600 per month over and above running expenses, whereas the fact was that it was not paying the proprietors anything at the time of the sale, and could not be made to pay anything over running expenses. The representations were fraudulently made for the purpose of inducing the defendant to purchase a worthless business and the property connected therewith. Being a private business enterprise, the facts whether or not it was a profitable enterprise, and to what extent, were peculiarly within the knowledge of the plaintiff and the partners

whom he represented. The defendant is not presumed to have had any knowledge on the subject except as obtained from the owners. He relied upon the statements made to him on their behalf, as he had a right to do, and dealt with them as with honest men. The result was that he was grossly deceived and defrauded. Instead of getting what he contracted for — an established and remunerative business, — he found himself incumbered with an enterprise that yielded no profit whatever, and with property, a considerable portion of which was useless for any other purpose than the water-supplying business, for which specific purpose he had purchased it.

As a consequence of the deception practiced upon him, the defendant says he is damaged in the sum of \$2,000.

The foregoing are all the material averments, and we discover nothing omitted which is necessary to be stated in order to entitle the defendant to recover, by way of counterclaim, such damages as are the natural and necessary consequence of the fraud complained of.

It cannot be said that upon discovery of the fraud he should have taken steps to rescind the contract, for he had his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages, either by an original action or as a counterclaim to an action against him for the purchase money, brought by the party committing the fraud. *Whitney v. Allaire*, 4 Denio, 556; *Lilly v. Randall*, 3 Col. 298.

Nor is it a valid objection that this portion of the answer contains no averment of the separate value of the stock, aside from the good will of the business. The contract was an entirety, and the sum of \$4,500, contracted to be paid, was the consideration for the whole property, which included the good will of the water-supplying business.

The defendant was entitled to the benefit of the entire contract as it was made, contemplating the *res*, or thing

purchased, as it was represented to be, not as it actually proved to be.

It is well settled that the good will of a business may have a property value, and form the subject-matter of contract and sale. *Cruess v. Fessler*, 39 Cal. 336; *Morse v. Hutchins*, 102 Mass. 439.

The plaintiff could not relieve himself of liability by proving that the stock alone was worth the sum of \$4,500. The question is not what was the value of the *stock*, but how much less was the value of the good will of the business and the stock, at the time of the purchase, than it was represented to be by the defendant. *Miller v. Barber et al.* 66 N. Y. 558.

If the property is more valuable than the consideration named in the contract, the profits of the bargain legitimately belong to the purchaser. So, also, if the seller falsely and fraudulently represents the property to be more valuable than it really is, and the purchaser is thereby deceived and induced to enter into a contract of purchase, he is entitled to the benefits which he would have derived therefrom if the representations had been true.

In *Morse v. Hutchins*, *supra*, Mr. Justice Gray says: "To allow the plaintiff * * * only the difference between the real value of the property and the price which he was induced to pay for it, would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrong-doer."

It is clear that no material facts respecting the value of the property were omitted. The averment that the defendant was injured to the extent of \$2,000 is equivalent to an averment that the property purchased was in fact worth that much less than it was represented to be worth. If the averment should be duly proven on trial, the defendant would be entitled to an allowance of the sum stated.

The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property is the same. It is to ascertain the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be. It is thus stated in a case involving the sale of a farm: "The true rule, as now settled, is the difference between the value of the farm as represented, and the actual value as it was when conveyed. In other words, how much more would the farm have been worth if the several representations made by the defendant, which were proved to be at once false, fraudulent and material, had been true?" *Wright v. Roach*, 57 Me. 600; citing *Stiles v. White*, 11 Met. 356; Sedg. on Damages (5th ed.), 333, 655, 658. See, also, *Miller et al. v. Barber et al.* 66 N. Y. 568; *Page v. Wells*, 37 Mich. 415, and *White v. Smith*, 54 Iowa, 233.

The case of *Morse v. Hutchins*, 102 Mass. 439, was very similar in its principal features to the case before us. It was an action for damages arising from false and fraudulent representations touching the business and profits of a firm of which the defendant was a member, by means of which the plaintiff was induced to buy the interest of the defendant in the stock and good will of the firm.

Upon the subject of damages, the jury was instructed that "the measure of damages would be the difference between the actual value of the stock and good will purchased, at the time of the purchase, and the value of the same had the representations been true." It was held that the correct rule was announced in the instruction.

Perhaps in the present case the court thought the facts stated did not sufficiently indicate the nature of the damages claimed, to prevent surprise at the trial, and that the defendant could not be permitted, as against an objection, to introduce testimony on the subject.

The answer to this objection is, that it is only necessary

to particularly specify the items when the damages claimed are not the direct and necessary consequence of the wrong complained of.

This rule is not applicable to a claim for general damages, such as here presented. On the contrary, when the pleading contains a claim for general damages, supported by a statement of facts showing that the damages claimed are the natural, necessary and direct consequence of the wrong complained of, it is sufficient, and not subject to demurrer. Should proof of special damages be offered on trial, the objection can be raised there that the complaint or answer, as the case may be, contains no such claim.

· If, for example, the defendant in this case should offer to prove under this answer, that, by reason of the purchase of the business and stock mentioned, he had lost six months of his time, which was of the value of \$100 per month, an objection that no such facts were stated in the answer would be good. But proof that the things purchased were not as represented, and were less valuable, by a certain sum of money, than they were represented to be, would naturally and necessarily follow from the statements of the answer.

Mr. Chitty says: "Damages are either general or special. *General* damages are such as the law *implies*, or presumes to have accrued from the wrong complained of. *Special* damages are such as *really* took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences; as where words become actionable only by reason of special damage ensuing." 1 Chitty, Pleading, *411.

In *Jutte v. Hughes*, 67 N. Y. 268, which was an action for injuries alleged to have been occasioned to plaintiffs

premises by the flow of water and filth from defendant's premises adjoining, in answer to the objection that special damages should have been alleged, the court say: "This doctrine might well apply in actions of slander, and of a kindred class, under the common law practice, which requires that special damages should be specially alleged. Where, however, the damages necessarily result and naturally flow from the injury complained of, they may be recovered without any special averment."

In *Rice v. Coolidge*, 121 Mass. 393, 398, which was an action for a tort, the court say: "Another ground of demurrer is that the declaration does not contain any allegation of damage sufficient to constitute a legal cause of action. The acts charged upon the defendants are such that the natural and necessary consequences of them are to injure the plaintiff. Under the general allegation of damage she may recover damages for this injury, and no allegation of special damage is necessary to enable her to maintain her cause of action." See, also, *Shaw v. Hoffman*, 21 Mich. 151, 158; *Miller v. Barber et al.* 66 N. Y. 564; *Roberts v. Graham*, 6 Wall. 578.

We are of opinion that the averments of the answer show a direct damage resulting to the defendant from the wrongful acts of the plaintiff.

It does not affect the issue in this case that the plaintiff sues for a portion of the purchase money. In legal contemplation the entire consideration was paid when the defendant executed his obligations to that effect. The defendant is entitled to a single satisfaction of his damages; and, as above stated, he may either bring an original action therefor, or set up his demand as a set-off or counterclaim to any action brought against him by the party who committed the fraud.

The fact that the demands sued on were assigned to the plaintiff does not exonerate him. It is charged that the false representations were made by him, and he must

be held personally responsible for the consequences. *Eaton, etc. Co. v. Avery*, 83 N. Y. 31.

The remaining errors which have been assigned relate principally to matters concerning which the court was vested with large discretion, and we cannot say that it was not properly exercised.

The judgment is reversed and the cause remanded.

Reversed.

7 494
8 65
11 301

THE DENVER, SOUTH PARK & PACIFIC RAILWAY Co. v.
RILEY.

The provision in a grading contract, for submitting to the chief engineer of one of the contracting parties, for final decision, disputes upon matters referred to in the contract, is valid and binding. It is simply the declaration which contracting parties have a right to make, as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case such disputes arise. And the decision of the engineer thereon, in the absence of fraud or palpable mistake, is final.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

MESSRS. TELLER and ORAHOOD, for appellant.

MESSRS. BROWNE and PUTNAM, for appellee.

HELM, J. Appellee brought this action in the court below to recover from appellant a balance claimed to be due for grading seven sections of its railroad. This work was done under a written contract, similar in form to those generally adopted in like cases. Among other provisions in this contract is the following:

"And it is further agreed, that, in case any disputes or differences shall arise between the company and contractor, as to the construction or meaning of the agree-

ment and specifications, or sufficiency of the performance of any work to be done under it, or price to be paid, all such disputes or differences shall be referred to the engineer, who shall consider and decide the same; and his decision shall be final to the parties, who hereby submit all and singular the premises to the award and arbitration of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed that the submission to the engineer, touching all matters herein contained agreed to be submitted to him, shall be deemed, considered and taken as an essential part of this agreement, and not revocable by either of the parties thereto."

This specification is perfectly valid and binding. It is simply the declaration which contracting parties have a right to make, as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case disputes arise upon certain matters contained in the contract; provided the evidence so stipulated for be not illegal. *McMahon v. N. Y. & E. R. R.* 20 N. Y. 463; *Smith v. Briggs*, 3 Denio, 73; *United States v. Robeson*, 9 Peters, 371; *Wilson v. York & M. L. R. R. Co.* 11 Gill & Johnson, 73.

Appellee claims that the total amount of work done by him was underestimated by the engineer, and that consequently his compensation was less by several thousand dollars than it should have been.

His position is, and must be, that the aggregate amount of grading done under the contract is not one of the matters as to which the engineer's decision was to be final and conclusive. Upon this view of the contract adopted by the court below, he obtained his verdict. Upon this view alone could he have maintained his action; for the engineer had passed upon the measurements and fixed the amount of work performed. Appellee charges no fraud against the officer, nor does he aver or attempt to prove any such mistake on the latter's part as will vitiate

his determination of the question; these things being true, the engineer's decision would be final if the matter is covered by the italicised phrases in the above paragraph taken from the agreement. *Howard v. The Alleghany Valley R. R. Co.* 69 Pa. St. 489; *Reynolds v. Caldwell*, 51 id. 298; *O'Reilly v. Keons*, 52 id. 214; *Condon v. South Side R. R. Co.* 14 Grattan, 302; *Vanderwerker v. Vermont Cent. R. R. Co.* 27 Vt. 130.

Our decision upon the errors assigned in this case must therefore be controlled mainly by the construction we shall give to this portion of the contract. The engineer mentioned is the chief engineer of the appellant company.

The chief engineer of a company engaged in the construction of an extended line of railroad cannot be personally on the ground superintending the work of each of a number of grading contractors. As shown by the record in this case, he is obliged to leave the immediate daily supervision of this work to deputy or assistant engineers; these deputies make the necessary measurements and computations from time to time, and report the same to their chief. They represent the company, however, and disputes between them and the contractor concerning the work, are disputes between the *company* and contractor. Such disputes, when referring to the specified matters, are, therefore, among the disputes or differences submitted to the chief engineer for arbitration.

With this explanation, let us discover the true intent of the contracting parties in the foregoing language of the agreement.

It will be noticed that measurements of the amount of grading done are not specifically mentioned. It will also be observed that while the "engineer in charge is to make a final estimate of all the work done," differences concerning this "final estimate" are not in words submitted to the final decision of the chief engineer; are

these matters so submitted, by a fair and reasonable implication from the above language employed in the contract?

Disputes on three questions or classes of questions are referred to the engineer for decision. *First*, as to the construction or meaning of the agreement and specifications. It would not be contended for a moment that this includes differences concerning a final estimate of the total amount of grading.

Second, sufficiency of the performance of any work to be done. This evidently relates to the character and not the quantity of work performed under the contract; there might be no dispute whatever concerning the number of cubic yards to a given piece of grading, yet very great difference of opinion as to whether the work was done in the manner provided for by the specifications.

Third, the price to be paid. Four different kinds of work in connection with the grading were mentioned in the contract, and a different price was payable for each, viz.: "for earth excavation, twenty-three cents per cubic yard; for loose rock, thirty-five cents per cubic yard; for solid rock, \$1 per cubic yard; for extra hauling and over one hundred feet, two cents per cubic yard per one hundred feet."

It is obvious that in every section graded there would probably be more or less of each of these different kinds of excavation, and also a quantity of the hauling mentioned. The expense of constructing a section depended very largely upon the relative amounts of these different kinds of excavation. It was therefore of the first importance to determine this question, and settle which of the foregoing prices should be paid for a particular piece of work. This was also a matter about which there were likely to be differences of opinion between the contractor and the assistant engineer inspecting the work.

It seems to us the most reasonable conclusion, that the word "price," in the phrase under consideration, was

used by the contracting parties with reference to the question, *i. e.*, whether twenty-three or thirty-five cents, or \$1, or what proportion of each, should be paid for a given quantity of grading.

It is true that the aggregate amount of compensation could not be ascertained without first making appropriate measurements; but the question whether a given piece of work is "earth excavation," "loose rock" or "solid rock," and, consequently, the price payable per cubic yard therefor, is answered by inspection and not by measurement; whether twenty-three cents or \$1 shall be paid per cubic yard, is a question entirely separate and independent of the interrogatory as to how many cubic yards a piece of work may contain.

This conclusion concerning the meaning of the language adopted in the contract receives additional sanction from the considerations that the form used was doubtless prepared by attorneys for the appellant company, and that provision for submission to the engineer of disputes upon this question could easily have been placed in the agreement by language free from ambiguity.

The fact that it was not so embodied is an indication that the company did not intend to have it there.

We do not think the district court erred in its theory of the contract; therefore the evidence objected to was properly admitted, and the instructions fairly state the law applicable to the case. We conclude that the question as to whether the amount of grading done by appellant under the contract was underestimated by the engineer might properly be tried in this case. There was evidence upon this question on which the jury might rest the finding made; as to its sufficiency, they were the judges, and this is not one of those instances wherein we would be warranted in disturbing the judgment based upon their verdict.

It will therefore be affirmed.

Affirmed.

BEAN V. GREGG.

7	499
12	400
7	499
13	17

1. Under section 28 of the code, action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides.
2. To maintain an action at law for the balance found due upon a settlement of partnership accounts, an averment in the complaint of the settlement is essential, and without such averment the pleading is fatally defective.
3. A defective averment may sometimes be cured by verdict; but the entire absence of a material averment is fatal to a recovery.

Appeal from District Court of Pueblo County.

THE facts are sufficiently stated in the opinion.

Messrs. SIMMONDS and COBB, for appellant.

Messrs. PATTON and URMY, for appellee.

HELM, J. There is nothing in appellant's first objection. The action was brought in the county where appellee, who was plaintiff, resided. This is expressly authorized by section 28 of the code of 1883. See *Law v. Brinker*, 6 Col. 555. The second assignment of error is also without merit. The change of venue was demanded upon the ground of the convenience of witnesses. But it appears from the affidavits filed, that the expense and inconvenience to plaintiff, occasioned by the change and consequent delay, would have been great; it appears, also, that no sufficient excuse was given for not interposing the motion at an earlier moment. Aside from these reasons supporting the court's rulings, the record shows that the trial was postponed for thirteen days; that a written stipulation was entered into by the parties fixing a date and place for taking the depositions of appellant's absent witnesses; and that he had ample time to secure their testimony had he desired so to do.

There was no abuse of discretion or error in denying the application.

But the principal objection relied on for a reversal is, that the action could not be maintained in a court of law, there being no averment in the complaint of an accounting and settlement between the partners; and that all evidence of such settlement ought to have been rejected when offered at the trial.

An action may be maintained by one partner against his copartner for the balance found due upon a settlement of the partnership affairs; the better rule is that no *express promise* to pay such balance need be shown; it is sufficient if the same has been ascertained and agreed upon by the act of both parties. But an averment of the settlement by the plaintiff is material, and without it his complaint is fatally defective.

The complaint in this case states that, "at the time of dissolution of said partnership, there were in the hands of defendant, A. J. Bean, clear profits from said business to the sum of \$2,133.15." This is the only declaration in the pleading that can possibly be construed as in any way referring to the subject under discussion.

Is the averment of a settlement and balance agreed upon contained by fair and reasonable intendment in the foregoing language; or are there any facts stated therein from which such an averment can be fairly implied? The rule is that doubtful language in a pleading is construed most strongly against the pleader. Reversing this rule, and construing this complaint most strongly in favor of plaintiff, can we answer these questions in the affirmative?

The above statement, taken from the complaint, simply declares that the business resulted in profits instead of losses, and names the aggregate amount of such profits. It cannot be said that the fact of plaintiff's ability to state the exact net profits in dollars and cents *implies* an accounting and settlement; the strongest reasonable implication that could be indulged in from this statement is that the plaintiff himself had examined the books, in-

vestigated the business and ascertained the exact profits. This might be absolutely true, and yet it might be equally true that the defendant had nothing whatever to do with such investigation, and knew nothing about it.

It is argued by counsel for appellee that the words "clear profits" have precisely the same meaning in this connection as would have been expressed had the pleader used instead the expression, "ascertained balance."

It is only by the implication above suggested that this can be considered true. But admitting the correctness of counsel's position, still his argument is in no wise strengthened; for, quoting from his own authority, it is only when "an ascertained balance of profit remained in the hands of one of the late partners, *upon a general settlement of accounts*," that an action can be maintained by the other for the recovery of such balance. 2 Addison on Contracts, p. *800.

The language of the complaint, by reasonable construction, rather excludes the idea of intention to aver a settlement. The averment that there were clear profits to a certain amount in the hands of defendant is not such as the most inexperienced pleader would be likely to use in stating that a settlement had been made by the parties, and an ascertained balance agreed upon.

We are reluctantly forced to say that the complaint in this case entirely fails to aver a settlement, and that therefore it does not state facts sufficient to constitute a cause of action.

This is not an instance where a material matter is loosely or inartificially pleaded, but one where the same is entirely omitted.

We cannot agree with counsel in his position that defendant was not prejudiced by this defect, and that consequently the cause should not be reversed.

Defendant first presented this question by demurrer, which was overruled; he then answered, but in no way supplied or cured this defect in the complaint; at the

trial he objected to the introduction of all evidence offered upon this question, and duly preserved exceptions; in his motion for a new trial, and also in his assignment of errors, he renews the objection. He has done nothing to waive the defect, even were a waiver possible.

The jury found correctly upon the testimony, under the court's instructions; but the evidence, the instructions, the verdict and judgment are none of them supported by the complaint.

The main issue actually tried was the settlement; this issue was wholly unrepresented by the pleadings, and defendant omitted no opportunity to attack the proceeding.

The judgment must be reversed and the cause remanded.

Reversed.

IN RE GARVEY.

1. The justices of this court, acting singly out of term, are without jurisdiction to issue writs of *habeas corpus*, or to hear and determine matters arising thereon, notwithstanding the authority attempted to be conferred by the statute on *habeas corpus*.
2. The proceeding by *habeas corpus* is the proper remedy, under the statute of this state, to protect the right of persons charged with the higher class of crimes to a speedy trial, according to law.
3. In this case there were four successive terms of the district court, and one of the criminal court, to which the case had been transferred, at each of which the court had jurisdiction; at any one of the terms the petitioner might have been tried, but was not; the failure to try did not happen on the petitioner's application, he being in custody the entire time. *Held*, under the General Statutes (section 1616), upon which the petition is based, that the petitioner be discharged.

In the Supreme Court.

PETITION for *habeas corpus*; the facts are stated in the opinion.

Messrs. WELLS, SMITH and MACON, for petitioner.

Attorney-General D. F. URMY, for the people.

7	502
4s	76
7	508
498	498

STONE, J. The petitioner, who is imprisoned to answer to an indictment for manslaughter, now pending in the criminal court of Arapahoe county, prays to be discharged of his imprisonment under the provisions of the eighth section of the Habeas Corpus Act (General Statutes, p. 535), which is in the words following:

“If any person shall be committed for a criminal or supposed criminal matter and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty by the court unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for or on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material.”

The facts stated in the petition, and shown by the records, to bring the case within the provisions of the statute, are that in March, 1881, the petitioner was indicted for murder; that, before he was subjected to trial, the law of murder, as to him, was repealed; that, at the September term of the district court of Arapahoe county, the prisoner was tried, upon said indictment, for murder, found guilty thereof, and, by said court, sentenced to the penitentiary for life. That thereafter, petitioner prosecuted a writ of error out of the supreme court, to reverse the judgment aforesaid, and that said judgment was, at the April term, 1883, of said supreme court, reversed, upon the ground that, owing to the repeal of the law of

murder, as aforesaid, the petitioner could be prosecuted and punished for manslaughter only, under said indictment, and thereupon the said cause was remanded to the said district court with direction to proceed according to law. That thereafter, at the April term, 1883, of the said district court, the petitioner was, without any trial whatever, sentenced to imprisonment in the penitentiary for the term of eight years for manslaughter, and was imprisoned accordingly. That thereafter, at the December term, 1883, of the supreme court, petitioner applied to be enlarged from said last mentioned imprisonment under the Habeas Corpus Act; and thereupon, by the judgment of the said supreme court, it was held that the said last mentioned judgment of the said district court was void for want of a trial and verdict upon said indictment; but, inasmuch as it appeared that petitioner stood legally indicted of a felony, it was ordered that he be discharged from imprisonment in the penitentiary, and to be remanded to the custody of the sheriff of Arapahoe county, unless he should give bail in a sum fixed by this court.

It is further shown that being so remanded in pursuance of the order of the supreme court as aforesaid, the petitioner was again brought to the bar of the said district court, whereupon afterwards he interposed his motion to be discharged, for that, although committed for a criminal matter and not having given bail, he had not been tried on or before the second term of the court having jurisdiction of the offense, such delay not happening on the application of said petitioner, and that therefore he was entitled to be set at liberty in pursuance of the eighth section of the Habeas Corpus Act.

That afterwards, on or about the 4th day of May, 1884, the said district court, without determining petitioner's said motion, transmitted the record of the indictment and proceedings aforesaid into the criminal court of said Arapahoe county, a court having concurrent jurisdiction

of said offense, and that the motion aforesaid, coming on there to be heard, was denied by said criminal court, whereupon the petitioner applies to be set at liberty upon the present writ of *habeas corpus* by this court.

The present application of the petitioner was first made to me, as one of the judges of this court, at chambers, in vacation, the latter part of June last, and a question then arose touching the jurisdiction of the judges of this court, or either of them, to act upon such applications in vacation; and having declined to entertain jurisdiction in the matter, the application was renewed to the court upon its convening at the present session. The same question, respecting applications for this and other writs of original jurisdiction, has been frequently raised before us at chambers, and as frequently ruled upon by the judges, but as no record is made of such proceedings in vacation, no written opinion declaring such ruling has ever been filed by the court; and hence, although this question is not a material one in the determination of this application, since it is presented to the court, yet we deem it not out of place to pass upon the question here, in order that it may furnish a referable guide hereafter.

The points, therefore, to be passed upon in order are:

First. May the judges of the supreme court, or either of them, entertain jurisdiction to hear and determine such matters in vacation?

Second. Does the writ of *habeas corpus* lie as the proper remedy in this case?

Third. Ought the petitioner to be discharged or set at liberty upon the state of facts presented?

Upon the first question there is very little authority to guide in reaching a conclusion, aside from the language of our state constitution bearing thereon.

Section 2 of article VI of the constitution declares that "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction

murder, as aforesaid, the petitioner could be prosecuted and punished for manslaughter only, under said indictment, and thereupon the said cause was remanded to the said district court with direction to proceed according to law. That thereafter, at the April term, 1883, of the said district court, the petitioner was, without any trial whatever, sentenced to imprisonment in the penitentiary for the term of eight years for manslaughter, and was imprisoned accordingly. That thereafter, at the December term, 1883, of the supreme court, petitioner applied to be enlarged from said last mentioned imprisonment under the Habeas Corpus Act; and thereupon, by the judgment of the said supreme court, it was held that the said last mentioned judgment of the said district court was void for want of a trial and verdict upon said indictment; but, inasmuch as it appeared that petitioner stood legally indicted of a felony, it was ordered that he be discharged from imprisonment in the penitentiary, and to be remanded to the custody of the sheriff of Arapahoe county, unless he should give bail in a sum fixed by this court.

It is further shown that being so remanded in pursuance of the order of the supreme court as aforesaid, the petitioner was again brought to the bar of the said district court, whereupon afterwards he interposed his motion to be discharged, for that, although committed for a criminal matter and not having given bail, he had not been tried on or before the second term of the court having jurisdiction of the offense, such delay not happening on the application of said petitioner, and that therefore he was entitled to be set at liberty in pursuance of the eighth section of the Habeas Corpus Act.

That afterwards, on or about the 4th day of May, 1884, the said district court, without determining petitioner's said motion, transmitted the record of the indictment and proceedings aforesaid into the criminal court of said Arapahoe county, a court having concurrent jurisdiction

of said offense, and that the motion aforesaid, coming on there to be heard, was denied by said criminal court, whereupon the petitioner applies to be set at liberty upon the present writ of *habeas corpus* by this court.

The present application of the petitioner was first made to me, as one of the judges of this court, at chambers, in vacation, the latter part of June last, and a question then arose touching the jurisdiction of the judges of this court, or either of them, to act upon such applications in vacation; and having declined to entertain jurisdiction in the matter, the application was renewed to the court upon its convening at the present session. The same question, respecting applications for this and other writs of original jurisdiction, has been frequently raised before us at chambers, and as frequently ruled upon by the judges, but as no record is made of such proceedings in vacation, no written opinion declaring such ruling has ever been filed by the court; and hence, although this question is not a material one in the determination of this application, since it is presented to the court, yet we deem it not out of place to pass upon the question here, in order that it may furnish a referable guide hereafter.

The points, therefore, to be passed upon in order are:

First. May the judges of the supreme court, or either of them, entertain jurisdiction to hear and determine such matters in vacation?

Second. Does the writ of *habeas corpus* lie as the proper remedy in this case?

Third. Ought the petitioner to be discharged or set at liberty upon the state of facts presented?

Upon the first question there is very little authority to guide in reaching a conclusion, aside from the language of our state constitution bearing thereon.

Section 2 of article VI of the constitution declares that "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction

only." * * * And section 3, following, reads as follows:

"It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction and other original and remedial writs, with authority to hear and determine the same."

This language confers jurisdiction, in respect of remedies under the several writs enumerated, upon the court only by express terms, and not upon the judges thereof, and therefore, if the judges possess any such power, it is by implication from the foregoing language. That no such implication arises has been uniformly held by the judges of this court ever since the organization thereof under the state constitution. This court, as expressed by the language of the constitution above quoted, is constituted to be primarily and essentially a court of appellate jurisdiction. Constitutions are instruments of limitation, chiefly as to the powers thereby conferred, and had it been the intent of the framers of our constitution to confer jurisdiction in respect of the writs mentioned upon the judges of this court to act singly and out of term, such intent, as in the constitutions of many of the other states, should have been clearly expressed.

The question of most difficulty to be answered is that, inasmuch as the legislature has, by statutory provisions (section 1609, General Statutes), conferred this authority upon the judges, and since the constitution does not expressly declare that the justices in vacation shall not exercise this power, and that the legislature retains all legitimate powers not expressly forbidden, may it not legally confer such power upon the justices?

If this question be answered in the negative, as we think it should be, it is chiefly because the enumeration by the constitution of certain powers to be exercised by the court, and other language contained in that instrument, by clear implication forbids the exercise of such authority by the justices out of term.

In the case of *Ex parte Bollman* (4 Cranch, 75), under a statute giving the right to justices of the supreme court of the United States to issue the writ, but not to the court, it was held (Johnson, J., dissenting) that the court might do so if in the exercise of its appellate powers; but that the converse of this proposition would legally follow is far from conclusive. We incline to think that the writ of *habeas corpus*, while ancient and existing as a common law writ before its enactment as the statute of 31 Car. II., is not now issued by courts or judges except the power so to do be expressly given by statute.

And in the case of *Ex parte Bollman, supra*, it is said by Chief Justice Marshall, that "Courts which originate in the common law possess a jurisdiction which must be regulated by a common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction; * * * for the meaning of the term *habeas corpus* resort may unquestionably be had to the common law; but the power to award the writ by the courts of the United States must be given by written law." And, considering the language of our own constitution touching the question, and also the nature, objects and prime functions of our supreme court, we conclude that the justices thereof, acting singly or out of term, are without constitutional jurisdiction and authority to issue the certain writs enumerated in the constitutional provision referred to, or to hear or determine the matters arising thereon.

Second. Is the proceeding by *habeas corpus* the proper remedy in this case?

We think it is. The statute under which the remedy is sought, and the only one which affords such remedy, where one exists at all, is in the Habeas Corpus Act; and a substantially similar provision for accomplishing the

same object—the securing to persons charged with the higher class of crimes a speedy trial, according to law—was contained in the English Habeas Corpus Act of Charles II., and, with various modifications, has been brought down to our time, as a part of the act providing for the issue of this famous writ of right, for the protection of personal liberty. In the case of *Brooks v. The People*, 88 Ill. 327, under a similar statute, the question was presented by writ of error, the statute in question having been taken out of the Habeas Corpus Act, and placed in the General Criminal Law; and so the question whether *habeas corpus* would lie was not raised nor discussed in the principal opinion; but, in the separate opinion of Mr. Justice Scott, who dissented upon another ground, it is said that *habeas corpus* lies in such cases.

The case of *The Commonwealth v. Adcock*, 8 Grattan, cited by the attorney-general, we deem unnecessary to review. It is sufficient to say that it is unsafe to attempt to avoid the hard consequences of a particular case by setting up what the court or judge may conceive to be the “spirit of the law” against the plain letter and principles of the law.

The same remedy was pursued in the cases of *Green v. The Commonwealth*, 1 Rob. (Va.) 731, and in *Glover's Case*, 109 Mass. 340, and, upon principle, we think the writ in such cases ought to lie; for, if a given case is brought within the provisions of the act, it becomes a case of an unlawful restraint of liberty. A few authorities hold a contrary doctrine, but, so far as I have examined, are cases arising upon statutes different from ours, such as the case of *Ex parte McGehan*, 22 Ohio St. 444, where the statute provided for the absolute discharge of the prisoner from the offense, and it was held that the judgment of the court below, denying the motion for such discharge, was to be reversed upon error, inasmuch as such judgment was a final discharge, which in effect was an acquittal of the crime charged. Our statute, it

will be noted, does not work such discharge of the offense, but operates merely to set the prisoner at liberty.

For the foregoing reasons we must hold that, in the case at bar, the writ prayed is the proper remedy.

Third. Ought the petitioner to be enlarged upon the facts presented?

The answer to this question rests upon matters of fact solely, for, in a case brought fairly within its provisions, the statute seems to be peremptory. We are not compelled, upon this application, to consider the proceedings in this case prior to the reversal upon error by this court (6 Col. 559), in May, 1883, of the judgment of the district court upon the conviction of murder. It appears from the uncontradicted averments of the petition, that, when the cause was then remanded to the district court "for further proceedings according to law," the April term of that court was still in session, and there can be no doubt as to that court's then having jurisdiction to try the case. Instead of putting the petitioner upon trial for the crime of manslaughter, the court, without trial or verdict, pronounced judgment against him and committed him to the penitentiary for the term of eight years. This court, upon *habeas corpus*, again interposed and discharged him from the penitentiary, but remanded him to the custody of the sheriff to be held for trial.

In the meantime the September term, 1883, and the January term, 1884, of said court came and went, and at the following April term, 1884, the petitioner interposed his motion for discharge under the statute. Before the hearing upon this motion the cause was transferred from the district court, upon its own motion, to the criminal court of Arapahoe county. The March term of this latter court was then in session, and, upon a hearing therein of petitioner's said motion, it was denied, after which the term adjourned without trying him.

It appears, then, from the record that there were four terms of the district court, to wit, April and September,

1883, and January and April, 1884, at each of which that court had jurisdiction both of the petitioner and his offense, and there was in addition one term of the criminal court, when this latter court possessed such jurisdiction. At each of these five terms the petitioner might have been tried; the failure to try did not happen upon his application, and he has been in custody during the entire time.

It seems to us, under this state of facts, that we must either misconstrue the statute, and legislate into it much that does not appear therein, or grant the prayer of the petitioner; and, for as much as the facts disclosed as above recited appear to bring the case clearly within the plain provisions of the statute upon which this application is made, it becomes our duty, in administering the law, to adjudge and order that the petitioner be set at liberty; and it is so ordered accordingly.

Petitioner discharged.

7 610
10 468

SMITH V. FAIRCHILD ET AL.

Where a broker, employed to sell real estate within "a short time," found a purchaser to take at the price fixed by the vendor, the vendee paying down a small sum to bind the bargain, and no notice being given the broker of withdrawal or change of terms, *held*, that two weeks was reasonable time within which to find a purchaser, and that a rise in value was no defense against the broker, seeking to recover commissions.

Appeal from County Court of Arapahoe County.

Messrs. HARMON and ELLIS, for appellant.

Messrs. BENEDICT and PHELPS, for appellees.

STONE, J. No legal question appears to be involved in this case; the judgment seems to be founded upon matters of fact, and the assignments of error raise simply

a question of the sufficiency of the evidence to support the judgment.

The appellees were ordinary real estate brokers, and as such were authorized by appellant to sell a certain number of town lots at a stipulated price, upon which a commission was to be paid by the appellant.

Appellees found a purchaser, who agreed to take the lots at the price fixed by appellant, and a small sum was paid down to appellees to bind the bargain. Upon applying to appellant for a deed to the lots, he refused to convey, saying that the lots had increased in value, and he had withdrawn them from market. Suit was brought by the appellees for the amount of their commission, and a finding and judgment had in their favor by the court below, for the sum of \$100, from which judgment this appeal is taken.

Appellant did not dispute the employment of appellees, or that he authorized them to make a sale or find a purchaser at the price stated. Nor did he dispute the amount or reasonableness of the commission in case of sale.

The only ground upon which he refused to carry out the sale by making a conveyance was that the property had increased in value.

This was no valid defense, since he had himself put the price upon the lots at which he authorized them to be sold, and had not definitely limited the time within which they might be sold at such stipulated price.

In his own testimony appellant stated that he authorized them to be placed upon the market by appellees at the price named, "only for a short time." Admitting this to be true, the time was not limited to any definite period, and the purchaser in question was found within two weeks from the time appellees were authorized to sell the lots, which time may be regarded as very fairly coming within the definition of "a short time."

No notice of a change of terms or of a withdrawal of the property from sale was given to appellees previous to

their informing appellant that they had found a purchaser who had agreed to take the lots at the given price, and requested a deed therefor.

If, at that time, the offered price was inadequate, it was the fault of appellant and not of appellees.

We think the judgment is supported by the facts in evidence as disclosed by the record, and it will be accordingly affirmed.

Affirmed.

7	512
7	521
10	131
7	512
24	520
29	66

SCHWENKE ET AL. V. THE UNION DEPOT AND R. R. Co.

1. If a patent on its face shows that it is issued under and in pursuance of certain acts of congress, and it is true that such acts were repealed prior to the application therefor, the patent is void, and may be impeached in a court of law.
2. An act of congress containing no words of present grant does not of itself operate as a conveyance of the legal title to land.
3. A local and special statute, which adopts, by reference, provisions relating to procedure from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.
4. The law does not favor repeals by implication. The legislative intent to substitute the new for the old law must clearly appear. A stronger repugnancy is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. The reluctance to recognize a repeal by implication, in the latter case, is still greater when the prior statute is not merely special or local in its operation, but also relates to a purely local subject.

Appeal from District Court of Arapahoe County.

THE case is stated in the opinion.

Mr. WM. A. HARDENBROOK, for appellant.

Messrs. TELLER and ORAHOD, for appellee.

HELM, J. The assignment of errors in this case contains thirty different specifications. The important ones,

however, may be condensed into two general questions, as follows: *First*. Was appellee, The Union Depot and Railroad Company, at the commencement of this suit, a corporation duly organized and existing under the laws of Colorado? *Second*. Is the patent through which appellee claims, conveying title of the original Denver town site from the United States to Hall, probate judge, in trust, absolutely void?

As shown by the record, appellant deemed it advisable to bring a separate action in the nature of *quo warranto*, directly challenging the corporate existence of the Depot Company. That suit was vigorously prosecuted, and resulted in a decision at the last term of this court affirming the validity of the corporation. *People ex rel. v. Cheeseman et al.* (*ante*, p. 376).

This decision fully answers and disposes of the first question above stated. Hence we proceed at once to a consideration of the second.

The validity of the patent in question is assailed on the ground that it was issued entirely without warrant or authority of law. The instrument itself contains the declaration that it is issued in pursuance of two certain acts of congress, passed in May, 1844, and in May, 1864, respectively. The former was a general town site law; the latter was a local and special act. In July, 1864, and ten months previous to the patent entry by Hall, congress enacted another general town site law; this last statute contained the following repealing clauses: "The act entitled 'An act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances,' May 23, 1844, and all other acts and parts of acts inconsistent with this act, be and the same are hereby repealed." Vol. 13, ch. 205, p. 343, U. S. Statutes at Large.

Appellant's contention is that this repealing provision swept away both of the previous acts above mentioned.

and that for this reason the patent is void, and conveyed no legal title whatever to the trustee therein named.

We will not question appellant's right to test the validity of this patent collaterally upon the foregoing ground. We shall assume without argument, that if a patent on its face shows that it is issued under and in pursuance of certain acts of congress, and it is true that such acts were repealed prior to the application therefor, the patent is void.

There is then such "an absolute want of power" as is mentioned in *Sherman v. Buick*, 93 U. S. 209, and cases cited, which renders the instrument liable to impeachment in a court of law. See *Patterson v. Winn*, 11 Wheaton, 380, and cases cited; *Parker v. Duff*, 47 Cal. 554, and cases cited.

It must be conceded at the outset, of course, that the law of 1844 was repealed by that of July, 1864; for it is expressly, in direct terms, so declared.

The discussion will therefore be confined to the question, Was the Denver act abrogated also by the repealing provision above quoted, or did its repeal follow the adoption of the subsequent law by implication?

This act is not, as claimed, an amendment of the law of 1844; it is "An act for the relief of the citizens of Denver, in the territory of Colorado." It is local and special; it was intended to relieve the inhabitants of a particular locality from an inconvenience or disability existing under the general law, and confer upon them certain privileges not bestowed thereby. This important and controlling purpose was attained by the very language of the statute itself; so far it was in no way dependent upon the general town site law of 1844.

The act did not itself operate as a conveyance of the legal title, because no "words of present grant" were inserted therein, and such was not the legislative intention. It recognized and declared a right to title, but required

that a patent issue, and that certain preliminary steps be taken by the probate judge therefor.

This procedure by that officer was incidental to the main purpose of the act; had congress remained silent on this subject, the statute would have been inoperative, but not invalid. That body chose to avoid a useless repetition of lengthy provisions; it incorporated into the Denver act, by reference to the law of 1844, a statement of the preliminary steps required of the probate judge. The following language is used: "except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of May 23, 1844." We understand this to mean that in procuring patent to the Denver town site and conveying title to the proper parties, the probate judge should proceed in the manner prescribed by the former law for the government of probate judges generally, in making town site entries; it is just the same, in our judgment, as though congress had copied into the latter act these provisions from the former.

It is therefore a logical sequence that the identity of the two laws, in this respect, does not affect the following propositions: that the latter is independent and complete; that the procedure for procuring patent and executing the trust incorporated by reference to the prior general law, remained in force for the purpose of carrying out the provisions of the special act; and that the existence and effect of the latter were not jeopardized by the repeal of the former.

"A statute which refers to and adopts the provisions of another statute is not repealed by the subsequent repeal of the statutes adopted." *Sika v. The Chicago & N. W. R'y*, 21 Wis. 375; *Wood v. Hustis*, 17 id. 429; *Crosby et al. v. Smith et al.* 19 id. 472.

We prefer, at present, to limit the foregoing doctrine to the facts in the case at bar. Our statement of it, then, is as follows: A *local* and *special* statute, which adopts,

by reference, provisions relating to *procedure* from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted.

The case of *Ellison v. Jackson Water Company*, 12 Cal. 542, cited by counsel for appellant, is not in point. The act there held inoperative by the repeal of the former law was general, not special; it was simply a supplement or amendment to the law repealed; it extended the provisions of the prior statute to include things not therein enumerated, viz., "bridges, ditches, flumes or aqueducts, constructed to create hydraulic power, or for mining purposes." The court appropriately say that the repeal "carried with it the *supplementary* act;" "without the original act there was no mode of enforcing the *supplementary* act."

But it is argued by counsel that the provisions of the Denver act are repugnant to and inconsistent with the statute of July, 1864; that, therefore, ignoring its dependence upon the law of 1844, there was both an implied and an express repeal thereof; that such repugnancy and inconsistency in and of themselves operated to produce a repeal by implication, and also bring the statute within the express provision repealing all inconsistent acts.

It is hardly necessary for us to consider these propositions separately. If there is no such repugnancy as would produce a repeal by implication, it will, in our judgment, appear that in this instance there is no such conflict or inconsistency as produces an express repeal under the declaration quoted.

The law does not favor repeals by implication; they will not be adjudged to follow, unless there is such a positive repugnancy that the two statutes cannot consistently stand together; the legislative intent to substitute the new for the old law must clearly appear; this intent is never *prima facie* presumed. Potter's Dwarrris, p. 155, and cases cited; Bishop on Written Laws, sec. 154, and cases.

And a stronger repugnancy or clearer indication of legislative intent is necessary where the repeal of a prior *special* act is claimed to result from the subsequent passage of a *general* law. "A general affirmative statute does not repeal a prior particular statute, * * * unless negative words are used, or unless there is such irreconcilable inconsistency as indicates an intent of the legislature to repeal." Sedgwick on Construction of Statutes, p. 98, note (a), and cases cited; *Conly et al. v. Supervisors*, 2 West Va. 416; *Ottawa v. La Salle County*, 12 Ill. 339; *Brown v. County Commissioners*, 21 Pa. St. 43; *Blain v. Baily*, 25 Ind. 165; *Williams v. Pritchard*, 4 T. R. 2.

The reluctance to recognize a repeal by implication, in the latter case, is still greater where the prior statute is not merely special or local in its operation, but also relates to a purely *local subject*; it has been said that then the "language and scope of the subsequent act must be equivalent to an express repeal." *Cole v. The Board of Supervisors*, 11 Iowa, 552.

Of course, the cardinal rule of construction prevails in this field. The inquiry in all cases is: What did the legislature intend? The numerous and discordant decisions upon this subject attest the difficulty of discovering and declaring safe subordinate tests as general rules. But the foregoing remarks indicate that there is a recognized difference in the degree of clearness with which the intent must appear; a difference dependent upon the character and purpose of the prior statute. In this particular the cases seem to be in harmony; but the minor tests adopted by courts, in their endeavor to arrive at the legislative design in this matter, are not uniformly applied, even under similar circumstances; and each particular case must, of necessity, be determined largely upon its own peculiar facts and surroundings, irrespective of rules and precedents.

We apprehend, however, that, with the light afforded

by the recognized distinctions above stated, there will be no serious difficulty in correctly answering the question of repeal in the case before us.

Were the Denver act and that of July, 1864, both general, we might be constrained to agree with counsel for appellant; these acts provide systems of procedure for patent radically different; the former preserves the trustee method of making entries; the latter discards it entirely, and substitutes a system wholly at variance therewith; there is nothing to indicate that the latter was designed to be cumulative; it cannot, therefore, be contended that both systems are applicable to the same patent proceedings.

But the Denver statute possesses three characteristics which, in our judgment, under the law above stated, prevent its repeal on the ground of inconsistency or repugnancy: *First*, it is *special*, in that its operation is confined to a particular municipal corporation; *second*, it treats of a purely *local subject*; and *third*, there is but one thing to be done, a single act or proceeding authorized, viz.: the procuring of patent to certain specified quarter sections of land. Upon issuance of this patent the act practically performed its office. This is unlike those cases where the particular thing to be done is repeated at stated or irregular intervals; as where a peculiar or unusual tax is authorized to be collected from year to year by the city authorities, or where a special penalty is visited in a particular city or county, upon the commission of a designated offense.

The primary reason for declaring repeals by implication is that conflict and confusion may not prevail in the application of the law. It is presumed that the legislature intended that no difficulty of this kind should exist. Hence where two statutes relating to the same subject are so conflicting that they cannot both be applied to the subject referred to, and the later is not cumulative, courts have recourse, when necessary to avoid confusion

and carry out the legislative intent, to the doctrine of repeals by implication.

But the concurrent existence and enforcement of the Denver act and the July law could produce no inconvenience or confusion; no conflict could arise in complying with their respective provisions; no one would ever attempt to enter any other town site under the Denver act; and the entry of the tracts of land specified therein, could in no possible way affect proceedings for patent in other cases, under the general law.

To avoid the foregoing conclusions we must say that the land specified in the Denver act was intended to be included by congress as one of the town sites mentioned in the July law; this would amount to a concession of the very point under discussion. If congress did not so intend, there can be no repugnancy or inconsistency between the two statutes; for in that event they do not refer to the same subject-matter. Unless we can find something else besides the so-called repugnancy itself of the two acts, which indicates a purpose on the part of congress to have the latter include the subject-matter of the former, we must hold that it does not do so. For, as already shown, all presumptions, in cases like this, are against recognizing this kind of repeals.

It is argued that on the 1st of July, 1864, congress had before it the whole subject of town site entries on the public domain; and that if it had been the intention to retain in force the Denver statute, such exception would have been expressly stated. It may be answered that the Denver act was passed at the same session, and only thirty-two days prior to the July law; hence, the presumption that congress had not forgotten its existence is especially strong; and it is reasonable to suppose that if congress intended to rescind so recent an enactment, it would have so declared in express words; this precaution was taken with reference to the general law of 1844,

in connection with which much less uncertainty could arise.

Nor does the statement that all inconsistent acts were repealed imply that congress had specially in view the Denver act. This provision is common in general statutes; it is inserted through an abundance of caution, and creates no necessary presumption that there are conflicting provisions. Besides, for aught we know, there may have been other general or special acts of congress which these words were designed to repeal.

The proposition has been announced, that "a general law does not operate as a repeal of a special law on the same subject, passed at the same session." *Ottawa v. La Salle County*, 12 Ill. 339; citing 4 Pike, 410.

This declaration must be accepted with the qualifications hereinbefore suggested; but the fact that at the same session of congress a special and a general law are enacted, justly strengthens the presumption against an intent to repeal, the prior special act not being specifically mentioned.

In view of the principles of law above noted, we are of opinion that there was no implied or express repeal of the Denver act. Under all the circumstances, we think the two statutes may stand together. We have no doubt but that the finding of the district court is right and should be affirmed.

If, however, the scales of judgment upon the questions above discussed were evenly balanced; and if there existed in our minds uncertainty as to the technically proper ruling in the premises, we would resolve the doubt in favor of affirmance. The patent which we are asked in this case to declare void with reference to the ground in controversy, covers upwards of nine hundred and fifty acres. The entry for this patent was made over nineteen years ago; upon the land conveyed thereby has since been constructed the most important part of the city of

Denver; with a few isolated exceptions, this instrument constitutes the first link in the chain of title relied upon. To hold the patent void as to the lot here in litigation, might, by unsettling title, impair the value of property worth millions of dollars. These circumstances render applicable principles, which, in a doubtful case, would most assuredly challenge consideration.

Holding, as we do, that so far as the objection here presented is concerned, the patent through which appellee claims is valid, no necessity exists requiring a discussion of the rulings as to the alleged rights or title of appellants. The judgment will be affirmed.

Affirmed.

SCHWENKE ET AL. V. THE UNION DEPOT AND R. R. COMPANY.

Appeal from the District Court of Arapahoe County.

Per Curiam: This action is similar to the one just decided between the same parties. The identical questions there determined are here re-presented in precisely the same manner. A different lot or parcel of land is in controversy, but the same principles govern both cases. Obviously a repetition of the argument is unnecessary.

The judgment of the district court will be affirmed.

Affirmed.

WILCOX ET AL. V. JACKSON.

1. The failure to record a chattel mortgage is fatal to its validity while the property remains in the hands of the mortgagor. An exception is recognized by the authorities where the possession in fact is in the mortgagee, but the mortgagor, *bona fide* and as agent for the mortgagee, continues to sell and appropriate the proceeds to the payment of the mortgage debt.

7	521
8	471
10	298
7	521
12	487
7	521
13	412
8	521
14	228
14	386
14	509
7	521
15	253
16	333
7b	521
17	557
7b	521
2a	07
7b	521
3a	154
3a	327
3a	491
7b	521
4a	8

7b	531
5a	413
7b	531
8a	24
7b	521
24	107
7	521
Case 2	
15a	590
7	521
20a	501
7	521
138	412

2. Where it was shown that new goods were purchased and mixed with the original stock from time to time after the giving of the mortgage, and no testimony establishing the identity of any portion of the goods seized by an attaching creditor, as the same goods mentioned in the mortgage, and the mortgage making no provision for goods to be afterward acquired, *held*, fatal to recovery under the mortgage.
3. Under the statute of frauds, as interpreted by this court, the vendee of chattels must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller to the purchaser.
4. As a rule, when acting in furtherance of the objects and business of the firm and within the scope of its business, one partner is clothed with full powers of all the partners, and is authorized to bind the firm in all transactions. This power and authority is based upon the principle of agency. But one partner cannot, against the opposition of another, make a general assignment for the benefit of a portion of the firm creditors, when such creditors, or their agent, have notice of such opposition.

Error to District Court of El Paso County.

THE facts are stated in the opinion.

Messrs. DECKER and YONLEY, for plaintiffs in error.

Mr. WM. HARRISON, for defendant in error.

BECK, C. J. This is a contest between creditors who are striving to obtain satisfaction of demands due and owing to them, respectively, from the late firm of Tribe & Jefferay, dealers in books, stationery, etc., at Colorado Springs and Leadville.

The goods and effects of the firm in the store at Colorado Springs were seized by the United States marshal, April 6, 1881, upon an attachment against said firm issued out of the United States circuit court for the district of Colorado, at the suit of Jansen, McClurg & Co.

The present action was instituted by W. S. Jackson, another creditor, against the marshal and his deputy, to recover possession of the goods attached, his right to

possession being based upon a chattel mortgage bearing date October 1, 1880, and upon an order for possession, assignment or transfer, of date March 18, 1881; also upon actual possession under said instruments previous to and at the time of the levy of the attachment.

There was a verdict and a judgment below in favor of Jackson, to reverse which judgment this writ of error is prosecuted in the interest of the attaching creditors.

Both the chattel mortgage and the order for possession were executed by the partner George H. Jefferay, in the firm name, without the knowledge or consent of his co-partner, Tribe, and the latter persistently refused to ratify either of these transactions up to the time that the rights of the attaching creditors are alleged to have accrued.

Plaintiffs in error contend that the chattel mortgage was fraudulent and void in law as to creditors upon several grounds, some of which are the following: No memorandum of the acknowledgment was made by the officer taking the same in his docket, as required by statute. The mortgage was not recorded. The goods mortgaged were left in the possession of the mortgagors, who continued to retail the same in the usual course of trade, as before, for their own benefit, with the knowledge and consent of the mortgagee, up to the 18th of March, 1881, a period of five and a half months.

Under our statute, as interpreted by the decisions of this court, either one of the above defects would necessarily have proved fatal to the validity of the mortgage, if the question had been raised while the goods and merchandise continued in the possession of Tribe & Jefferay. General Statutes 1883, pp. 159, 161, secs. 1-10; *Crane et al. v. Chandler*, 5 Col. 21; *Horner v. Stout*, id. 166; *City National Bank v. Goodrich*, 3 Col. 139.

Section 10 of the Chattel Mortgage Act (General Statutes, *supra*) contains a saving clause as to the failure to record the mortgage, when an adverse right to the property is acquired, with actual notice of the existence of the

mortgage. This saving clause does not cure a defective acknowledgment. The failure to properly acknowledge a chattel mortgage is therefore fatal to its validity, while the property remains with the mortgagor. *Crane v. Chandler, supra.*

The authorities also recognize an exception in favor of the mortgagee, where the mortgagor continues to sell the mortgaged goods in the usual course of trade, viz.: where the possession in fact is in the mortgagee, and the mortgagor in good faith, and as agent for the mortgagee, continues to sell and appropriate the proceeds to the payment of the mortgage debt. But any understanding or arrangement, by which the proceeds of sales should go to the mortgagor, or for his benefit, or for any other purpose than the liquidation of this debt, would render the whole transaction fraudulent and void as against creditors of the mortgagor. Jones on Chattel Mortgages, sec. 399, and authorities cited.

In the present case Jackson did not attempt to assume possession or control of the mortgaged property until the 18th day of March, 1881. He admitted, upon the trial, that he permitted the mortgagors to continue their retail trade after the execution of the mortgage, and that they made additions to the stock. He did not pretend that the sales were made for his benefit, or that the proceeds were applied in liquidation of his demands against the firm.

This arrangement was wholly inconsistent with the purposes of the Chattel Mortgage Act. The act was designed to give a creditor security for his claim, by a conditional sale of specific property. To permit a debtor to dispose of the property during the continuance of the lien for any other purpose than in satisfaction of the mortgage debt, would enable him to perpetrate a fraud upon his other creditors. If such a transaction was to be held valid, debtors would have an easy method of protecting their chattel property against the claims of

creditors, leaving to themselves all the benefits of an unincumbered title. It is sufficient to say the law is otherwise. Had the property in controversy been seized upon attachment prior to the 18th day of March, the jury must have been told that the mortgage was void as to creditors.

Another point fatal to a recovery under the mortgage, upon this record, is, that while the testimony shows that new goods were purchased and mixed with the original stock, from time to time, after the giving of the mortgage, there is no testimony establishing the identity of any portion of the goods attached, as the same goods mentioned in the mortgage. The mortgage makes no provision for goods to be afterwards acquired, but is a grant of property owned at the time of its execution.

Mr. Jackson himself declined to swear that the goods attached were the same goods mentioned in his mortgage. He could only swear that they were turned over to him as the same goods.

There could be no recovery under the mortgage upon such a state of facts. *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Same v. Same*, 15 id. 424; *Brainard v. Peck*, 34 Vt. 496; *Cameron v. Marvin*, 26 Kan. 612; Jones on Chattel Mortgages, secs. 167, 168.

It is contended, however, that Mr. Jackson was in possession of the property at the time of the levy of the attachment, under the mortgage and under the written order of March 18, 1881, referred to in the record as "Ex. B," and that his possession gave him a prior lien upon the stock.

It appears to be true that Jackson took possession of the store and goods on March 18th; but it is equally true that the character of that possession was such as gave no notice that any change had taken place in the ownership.

Such notice was essential to a right of recovery, under the peculiar circumstances of this case. If anything

was done to afford notice, actual or constructive, the fact was not proven. Section 14 of the statute of "frauds and perjuries" provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive." General Statutes, p. 509.

Interpreting this statute, this court has said that "the vendee must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands, and that the title has passed out of the seller into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property." *Cook v. Mann*, 6 Col. 21.

Chief Justice Elbert, who wrote the opinion in the above case, adds that the possession must be exclusive of the vendor, and that a concurrent or joint possession is not admissible.

The evidence in the record does not come within the rule announced. While it shows an actual change in possession, it fails to show that the usual *indicia* of ownership were used by the plaintiff, or that there was a visible change of possession, such as to apprise the community or creditors of the firm of such change. There was, in fact, nothing done, so far as appears, to put persons accustomed to deal with the former firm upon inquiry. The business was continued in the same building,

the goods being sold at retail, as before. The sign of Tribe & Jefferay was not removed, nor was there a new sign put up to indicate a change of proprietors. Jackson did not devote his time to the business, but Charles Jefferay, a brother of the partner, George H. Jefferay, was placed in charge. He was a clerk of the former firm, and, being accustomed to clerk there, his appearance indicated no change. George H. Jefferay continued to be in the store for a considerable time after the transfer, writing up his books, and at times selling goods. The only visible change that appears to have been made was the employment of another clerk, one Curtis.

It cannot be said that the mere employment of an additional clerk in a mercantile establishment is sufficient notice of a change of ownership to put creditors and purchasers upon inquiry. No notice was even given to Cantril, the deputy United States marshal, who levied the attachment, that Jackson had any claim upon the stock. He says he went into the store and inquired of Charles Jefferay if the proprietors were in. The reply was that they were not in; that Tribe was in Leadville, and the other partner was expected that evening. He went out to look up Deputy United States Marshal Dana, and, upon his return, told Charles Jefferay what his business was, made the levy, placed Dana in charge, and proceeded to serve notices of the attachment by leaving a copy at the residence of Tribe, and notifying Jefferay; after which he met a Mr. Wolf, who told him that Jackson had some claim upon the goods, which, he says, was the first information he received of that fact.

Jackson stated in his testimony that he notified the marshal of his claim before the levy, but subsequently corrected himself by saying that he was not at home when the levy was made, but gave the notice afterwards.

Charles Jefferay admits that he was in the store at the time of the levy, but remembers of no conversation with

Cantril. When asked if anything had been done about the store that could be seen by any customer, either outside the door or in the store, to indicate that the business was not being conducted by Tribe & Jefferay, his answer was: "Nothing except by Mr. Curtis being in the store." When asked if he had told people that Jackson had possession of the property, he answered that he had told several who had inquired about it, but could name no one whom he had told.

Mr. Dana, who was a constable at Colorado Springs, and a deputy United States marshal, states that he was in the habit of passing the store and had seen nothing to indicate a change of possession from Tribe & Jefferay to another person. L. J. Tell, a resident, marshal of the city, says he saw nothing to indicate a change.

This being the condition of the testimony, it is our opinion that the question was improperly submitted to the jury, whether Jansen, McClurg & Co., or their agent, had actual notice of the change of ownership previous to or at the time of the levy of the attachment.

It remains to consider the effect of the paper "Exhibit B," as an independent source of title.

This instrument authorized Mr. Jackson to take possession of all the goods and chattels in the store in Colorado Springs, and to sell the same according to the terms of the mortgage, and to apply the proceeds in payment of his demands against the firm of Tribe & Jefferay.

The position of counsel is that this transfer amounted to an independent pledging of the goods and property of the firm for the payment of Jackson's claim.

Counsel for plaintiffs in error deny the power of one partner, under the circumstances of this case, to make such a transfer. They further say that Jackson did not rely on this order upon the trial below, as appears from his own testimony, but upon the mortgage and upon his possession. That the order distinctly referred to the mortgage, and authorized the mortgagee to take posses-

sion of the goods described in the mortgage. That this was its sole purpose and effect.

Upon the last proposition, we are of opinion that the phraseology employed in the latter instrument may be construed as an intention to make an independent transfer of the goods then in the store, together with delivery of possession. This transfer, if valid, would obviate the difficulty of identifying the goods conveyed by the mortgage, and vest a title thereto independent of the mortgage. The reference therein to the mortgage for the terms of sale does not conflict with this theory.

The object of the reference was merely as to the matter of procedure, and in legal contemplation was equivalent to incorporating in the order the same provisions upon this subject which were contained in the mortgage.

The only question of importance to be considered in this connection is: Did the partner Jefferay, under the circumstances of this case, have power, by the execution of this order, to make a valid transfer of the property to Jackson without the knowledge and consent of his co-partner?

The record shows that both partners resided in Colorado Springs, and that they had two stores, one in Colorado Springs and one in Leadville, Lake county; the one containing the principal portion of the stock in trade being in the former place. That Jefferay gave most of his attention to this store, and Tribe looked after the business in Leadville, although he, Tribe, appears to have been frequently at the place of his residence. It is a notorious fact that the two localities are not distant one from the other, and that telegraphic and railroad communication exists between them.

The testimony shows that Tribe was not consulted about this transfer, and that Jefferay and Jackson well knew that he was opposed to the giving of the mortgage and had at different times refused to sign it. We think

this equivalent to notice that he was opposed to any transfer or assignment of the stock to Jackson.

Another feature of the case, and one which discloses more fully the object of the transaction, is that on the same day on which the property in Colorado Springs was transferred to Jackson by this document (Ex. B), Jefferay confessed judgment in favor of Jackson for the sum of twelve thousand five hundred dollars (\$12,500) in the El Paso county district court. Upon this judgment an execution was issued to Lake county, and by virtue of it the entire stock in trade in Leadville, and certain parcels of real estate belonging to the firm, were sold.

Here, then, is presented a case where a partner attempts not only to give a preference to a single creditor, but to give it in such a manner as to divest both partners of possession and control of the entire partnership property, effects and business. His acts were destructive of the partnership itself. These acts were not only done without the knowledge and consent of the copartner, but in opposition to his wishes as previously made known to his partner and to the preferred creditor when they asked him to join in the execution of the mortgage. Can a transfer of this nature, made under such circumstances, be sustained? The power of a partner to act for and in the name of his firm, says Mr. Justice Story, extends to all purposes within the scope and objects of the partnership, and in the course of its trade and business.

Adopting the suggestion of a learned judge, he adds: "One partner, by virtue of that relation (of partnership), is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged." Story on Partnership, sec. 101.

Among the powers enumerated by this learned author

which may be exercised by one partner within the foregoing limits, is the power and authority, in behalf of the firm, to transfer, pledge, exchange or otherwise dispose of the partnership property and effects.

Mr. Parsons says: "The right of each partner to sell, assign or transfer any part, or the whole, of the partnership property, in the way of the regular business of the partnership, is absolute and unquestioned; * * * this, however, must be done in the regular course of the business of the firm; for, outside of this, he has no such power." Parsons on Partnership, *163.

The views of Mr. Chancellor Kent are to the same effect. 3 Kent Com. (4th ed.) p. 41.

The foregoing paragraphs concisely define the powers of individual partners within the law applicable to general partnerships. The substance of the rule is, that, when acting in furtherance of the objects and business of the firm, and within the scope of its business, one partner is clothed with full powers of all the partners, and is authorized to bind the firm in all transactions.

This power and authority is based on the principle of agency. The very nature and purposes of a partnership association necessarily constitute, it is said, each active partner a general agent of the firm, with implied authority to act for it in all matters of business, within the foregoing limits.

The limitation referred to is of the highest importance. Upon it depends, in a large measure, the security of copartners. When an attempt is made, by a single partner, without the consent of his associates, to bind the partnership in a transaction outside the usual scope of its objects and business, and one prejudicial to its interests, every principle of justice requires that courts should hold the act to be without validity. Especially should this be done where, as in the present case, the contracting parties have notice of the copartner's dissent to such transaction.

The doctrine as to the effect of notice is thus stated in 1 Am. Lead. Cases, 544: "The authority in a single partner, however, is not an inseparable legal consequence of an interest in the partnership, but is an actual agency implied from the supposed assent of the other members; an express notice, therefore, from one member of a firm, communicated to third persons, that he will not be bound by the acts, or by a particular act, of another partner, puts a stop to the implied authority of that partner to bind the firm." With these general principles before us, let us inquire more closely into the character of the transfer in the case at bar.

It was clearly not a sale, for no price was agreed upon at which the goods and effects should be taken and credited upon the indebtedness of the firm. Had it been an absolute transfer of the property in extinguishment of the debt, or a certain portion of it, a different question would arise.

Nor was it a pledge, for authority was given to sell all the property transferred. A pledge is defined to be a lien created by the owner of personal property by the mere delivery of it to another, upon an express or implied understanding that it shall be retained as security for an existing or future debt. A pledge is subject to redemption, and the lien is immediately divested by a tender of the amount secured.

An action for possession may be maintained by the pledgor, if the pledgee refuses to restore the property. The title to the property remains in the pledgor, while the possession, actual or constructive, according to the nature of the property or circumstances of the case, is with the pledgee. The latter can only sell upon default of the pledgor to pay according to the contract. Bouvier's Law Dictionary, title "Pledge;" 2 Parsons on Contracts, pp. 109, 117; 3 id. 271.

In *Bowie & Sons v. Napier & Co.* 1 McCord, 1, the court say: "By a pledge, we understand not only a

thing that may be redeemed, but generally one that is intended to be redeemed. Now, where goods are deposited with orders to sell, such an idea as that of redemption can never enter the mind, for the agent with whom they are deposited may, in the shortest space of time, alienate the right."

The effect of the transaction in the present instance was to transfer and surrender the property and stock in trade for the benefit of a single creditor, and at the same time to constitute such creditor the trustee of an implied or resulting trust in favor of the firm; the terms of the trust were that Jackson should sell the property in a specified manner and apply the proceeds in liquidation of his claim.

If any surplus of money or property remained after satisfaction of his demands, as might have been the case considering the simultaneous confession of judgment by the same partner, the assignee was bound to return the same.

It is evident, then, that this transfer was in the nature of, or analogous to, a voluntary assignment for the benefit of a creditor of the firm.

Says Mr. Burrill in his valuable work upon assignments: "Voluntary assignments for the benefit of creditors are transfers, without compulsion of law, by debtors, of some or all of their property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor." * * *

The trusts of an assignment for the benefit of creditors, in one form or other, enter into the composition of all assignments which contemplate provision or security for creditors, embracing not only such as are made to trustees, but such as are made directly to creditors themselves. Implied or resulting trusts are such as result from the transfer by intendment and operation of law. Burrill on Assignments, secs. 2, 238, 240.

Both Mr. Justice Story and Mr. Parsons express grave doubts whether a partner can make a general assignment of all the property and effects of the partnership for the benefit of creditors. These doubts arise from the consideration that such a transaction is not in furtherance of the objects of a partnership, but of itself operates as a dissolution. Story on Partnership, sec. 101; Parsons on Part. p. *166.

Mr. Parsons thinks the weight of authority is in favor of the power where the assignment is made without preferences of any kind. He qualifies the doctrine still further in a note to page *167, after reviewing the cases on the subject. The further qualification is: "if such an act is justified by the situation of the firm at the time, and if the other partners are absent from the country, or have made the assignor sole managing partner, or if in any other way, expressly or by implication, they may be supposed to have conferred upon the assigning partner sufficiently extensive authority."

The case under consideration does not come within any of the exceptions mentioned. The other partner was not absent from the country. No emergency existed to justify or excuse hasty action without consultation with the copartner. Jefferay had not been constituted sole managing partner at Colorado Springs, as appears from Tribe's repeated refusals to ratify the mortgage, and from his visit to and conduct at the latter place upon hearing of the transfer.

Considering the contemporary acts of making this assignment and confessing the judgment in opposition to the known wishes of his copartner, and in the light of their natural and actual consequences, viz., the destruction of the partnership business in both places, it is evident that the acts of March 18th were not based upon a supposed power of sole management at one point, but upon an assumed power of sole control, *nolens volens*, at both points and over the entire partnership business

and property. The acts of Jefferay of March 18th were as destructive of the partnership as if the whole property of the firm had been included in a general assignment. These acts being contemporary, and having the effect of a general assignment for the benefit of a creditor, the law applicable to a general assignment becomes, by analogy, applicable to the assignment in the present case.

Concerning the power to make such an assignment Mr. Justice Washington says: "But it may admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects (otherwise than in the course of trade in which the firm is engaged) in such manner as to terminate the partnership." *Lord v. Graham*, 4 Wash. C. C. 232.

The authorities bearing upon the subject are reviewed in *Bowen v. Clark*, 1 Bissell, 128. The conclusion arrived at is as follows: "The principle to be extracted from nearly all the decisions appears to be this: that as a general assignment, if it does not dissolve the partnership, at least takes away from the partners the right of disposing of the effects assigned, all the members, if they are present, have a right to be consulted on such a step; that an assignment by one partner against the known wishes of another would be a fraud upon him and invalid, and an assignment without his knowledge would be presumptively so."

The New York court of appeals held, in *Wells v. March*, 30 N. Y. 350, that such an act was outside the scope of the partnership enterprise, and that the exercise of such a power amounted to a suspension or dissolution of the partnership itself. Said Mr. Justice Wright: "It is no part of the ordinary business of the partnership, but outside and subversive of it. No such authority as that can be implied from the partnership relation."

The question was considered in *Holland v. Drake*, 29 Ohio St. 441, "whether one member of an insolvent

firm, either before or after the dissolution of the partnership, can make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent, when present or accessible."

Chief Justice Welch, in delivering the opinion of the court, speaks of the want of uniformity in the numerous decisions, and concludes as follows:

"We have examined these cases with much care, and think the weight of authority, as well as the better reasoning, is with those who deny the validity of such an assignment. The power to make it is not within the contemplation of an ordinary partnership contract." The opinion of the court is that the safer and juster rule is to require either the actual or implied assent of all the partners.

The court of appeals of Kentucky concedes the power and authority of each partner, in behalf of the firm, to transfer, pledge or dispose of the partnership effects and property for any and all purposes within the scope of the partnership and in the course of its trade and business, but declares it to be well settled upon principle and authority, that one partner cannot, against the opposition of another, make a general assignment for the benefit of a portion of the firm creditors, when such creditors or their agent had notice of such opposition. *Bull v. Harris*, etc. 18 B. Monroe, 195.

Respecting the *implied* power of a partner to make such an assignment without the knowledge or consent of a copartner, Chancellor Farnsworth says, in *Kirby v. Ingersol*, Harrington's Ch. (Mich.), pp. 172-186: "There is no such implied power. The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern, and not for the purpose of breaking it up and destroying it. One partner does not, by any implication, confer a power upon his copartner of divesting him of all interest in or authority over the con-

cern. The elementary writers upon the subject do not sustain this position. The adjudged cases, when carefully examined, do not sustain it; and assuredly it is not sustained by the reason of the thing or the dictates of justice. Every consideration of public policy or commercial convenience is against it."

Being of opinion that the authorities cited announce correct legal principles, and that they are applicable to transfers of the nature of the one under consideration, made under the circumstances disclosed by the evidence, we hold that the paper, "Exhibit B," conveyed no title of itself and created no independent lien in favor of the plaintiff below, as against the creditors of the firm of Tribe & Jefferay.

Inasmuch, therefore, as the trial below was conducted upon a theory at variance with the views of the majority of the court upon several points, the judgment is reversed and the cause remanded.

Reversed.

Mr. Justice HELM took no part in the decision.

BRANDENBURG V. MILES.

Where a complaint failed to state sufficient facts to show wherein the refusal of defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass or detention, *held* bad on demurrer.

Error to District Court of Arapahoe County.

THE case is stated in the opinion.

MESSRS. BROWNE and PUTNAM and Mr. J. W. JENKINS, for plaintiff in error.

MESSRS. DECKER and YONLEY, for defendants in error.

STONE, J. The only question in this case is as to the sufficiency of the complaint. The said complaint, to which a demurrer for insufficiency to state a cause of action was sustained by the court below, is as follows:

"The plaintiff complains and alleges:

"I. That on the 1st day of January, A. D. 1880, he was the owner in fee simple of lot number 24, in block number 47, in the last division of the city of Denver, in said state and county, and has been from thence hitherto, and is now, the owner thereof.

"II. That on the 5th day of April, A. D. 1880, he purchased from one Joab O. Brown three inches off lot number 25 in said block, adjoining his said lot number 24, and the said fraction of said lot was on said last named day conveyed to plaintiff in fee simple, and he is now the owner thereof.

"III. That the plaintiff, having determined to construct a large and valuable brick building upon said lot and fraction, at a cost of \$20,000, to cover the entire frontage of said lot and fraction, being twenty-five feet and three inches on Larimer street in said city, employed a competent architect, at a large expense to plaintiff, to draft plans and specifications for said building, the frontage of which building was, by said plans and specifications, to be twenty-five feet and three inches on said street.

"IV. That said architect accordingly drew and completed said plans and specifications and submitted them to plaintiff, and that he approved the same on, to wit, the 25th day of April, A. D. 1880, and commenced the construction of his said building in pursuance thereto.

"V. That at all of the dates aforesaid, and from thence hitherto, the defendant was and is the owner of lot number 23 in said block 47, adjoining said lot 24, on which, on, to wit, the said 25th day of April, there was erected a frame building, which building extended over and on

the lot 24 of plaintiff a distance of three inches, so that plaintiff could not occupy his entire lot.

"VI. That on, to wit, the said 25th day of April, A. D. 1880, and at divers other times before and after that day, the plaintiff requested defendant to remove this said obstruction from his, the plaintiff's, lot, but that so to do the said defendant wholly neglected and refused.

"VII. That in consequence of the said refusal of defendant, and of his wrongful act in that behalf, plaintiff afterwards, and on, to wit, the 1st day of May, was required to have all of his said plans and specifications changed and re-drawn, at an expense of, to wit, \$500, and was required to and did reduce the width of his said building to twenty-five feet, and that thereby the said three inches of said lot 24 was lost to the plaintiff.

"VIII. That in consequence of the said wrongful acts of defendant, after the plaintiff had completed all of his arrangements for the construction of his said building, he, the plaintiff, was delayed in the completion of his said building for the period of two months, at an actual loss to him in the sum of \$2,000, and suffered other losses in the change in the width of said building, in the loss of his first plans and specifications, and in the entire loss of the said three inches off said lot 24 in said block, which plaintiff avers has been entirely lost to him and is now of no value, in the further sum of \$3,000; and plaintiff avers that he was forced to construct his said building without occupying and using the said three inches of said lot 24, because of the refusal of defendant to remove his said building therefrom.

"Wherefore plaintiff demands judgment against defendant for the sum of \$5,000, his damages, and for the costs of this action."

We do not think the court erred in sustaining the demurrer. The complaint does not state a cause of action in ejectment, nor in forcible entry or unlawful detainer, nor in trespass, nor for a specific recovery of the three inches

in width of the ground specified. Nor does it appear that the plaintiff sought to state a cause of action for either of the above mentioned remedies. The only facts stated as ground for recovery of the damages claimed are that plaintiff owned certain premises on which he desired to build so as to cover the whole width thereof, and made plans accordingly; that defendant owned a house which covered a portion of said premises; that plaintiff requested defendant to remove the house from the portion in controversy, and that defendant refused; that plaintiff thereupon, instead of seeking by legal means to obtain possession of that portion of his ground claimed to be covered by defendant's house, altered his architectural plans, built a smaller house than first designed, and thereafter brings this action to recover damages for delay in the construction of his house, loss "in the width of the building," the expense of altering plans, and "the entire loss of the said three inches off said lot," and bases his right of recovery of the sum demanded as damages upon the alleged "wrongful act" of defendant in neglecting and refusing "to remove his said obstruction from the plaintiff's lot."

The complaint fails to state sufficient facts to show wherein the refusal of defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass or detention. For aught that appears in the complaint, the defendant's alleged occupation of plaintiff's ground may have been by virtue of a previous unexpired lease or some other lawful right, and such possibility of right is not precluded by the averment that the plaintiff was the owner in fee of the ground in question. The recovery of damages must in all cases rest upon facts showing a right on the part of the plaintiff to require the performance on the part of the defendant of some legal duty, a failure to perform such duty, and that the

damages sought resulted therefrom. The complaint in this case falls far short of setting out a state of facts in compliance with this rule. Plaintiff was given an opportunity by the court below to amend his complaint, but elected to stand thereby. Perceiving no error in the record, the judgment dismissing the complaint will be affirmed.

Affirmed.

MURPHY V. HOBBS.

1. In civil actions for injury resulting from torts, where the offense is punishable under the criminal laws, exemplary damages, as a punishment or example, cannot be awarded. *Quere*, whether the recovery in all cases should not be limited to a liberal rule of compensatory damages?
2. In actions for malicious prosecution, malice may be implied or imputed from the absence of probable cause.
3. But affirmative evidence of language or acts on the part of the prosecutor, tending to show actual malice, are admissible in evidence when they are so closely connected with the transaction as to be part of the *res gestæ*.

Appeal from District Court of Weld County.

THE facts are stated in the opinion.

Mr. WM. B. MILLS, for appellant.

Messrs. HAYNES, DUNNING and HAYNES, and Messrs. RHODES, LOVE and McCREERY, for appellee.

HELM, J. This is a civil action, brought to recover damages for malicious prosecution and false imprisonment. Plaintiff procured a verdict, and judgment was duly entered thereon. Defendant prosecutes this appeal and assigns in support thereof numerous errors. The most important of these assignments is one which relates to the measure of damages adopted in the court below.

7	541
10	534
11	350
7	541
12	88
7	541
15	410
15	455
7	541
17	448
7	541
19	507
7	541
20	60
7	541
5a	265
7	541
23	118
9a	225
7	541
15a	227
15a	228

Upon this subject the following instruction was there given: "That the measure of damages in an action for malicious prosecution is not confined alone to actual pecuniary loss sustained by reason thereof; but if it is believed, from the evidence, that the arrest and imprisonment stated in the complaint were without probable cause, then the jury may award damages to plaintiff to indemnify him for the peril occasioned to him in regard to personal liberty, for injury to his person, liberty, feelings and reputation, and *as a punishment to defendant* in such further sum as they shall deem just."

By the assignment of error and argument challenging the correctness of this instruction, we are called upon to consider the following question, viz.: Can damages, *as a punishment*, be recovered in cases like this?

The rule allowing, under certain circumstances, in civil actions based upon torts, exemplary, punitive or vindictive damages, for the purpose of *punishing* the defendant, has taken deep root in the law. It has the sanction of learned courts and law writers, among the latter Mr. Sedgwick; and its abrogation should be favored only upon the most weighty considerations. But we find denying its correctness, Professor Greenleaf and several courts of the highest respectability.

As we shall presently see, the question is not conclusively *res judicata* in Colorado. We therefore feel at liberty to inquire into the reasons urged against the doctrine.

Were this subject now presented to the various courts of the country for the first time, we have little doubt as to what the verdict would be; the propriety of adhering exclusively to the rule of compensation appears, upon careful investigation, with striking clearness. But many of the courts, like that of Wisconsin, while expressing strong disapprobation of the doctrine "inherited," and declaring it "a sin against sound judicial principle," feel constrained to preserve it, on account of precedent

in their respective states, and the "current of authority elsewhere." *Brown v. Swineford*, 44 Wis. 282.

Perhaps the most impressive objection to allowing damages as a punishment in cases like the one at bar, is that which relates to dual prosecutions for a single tort. Our state constitution declares that no one shall be twice put in jeopardy for the same offense. A second criminal prosecution for the same act after acquittal, or conviction and punishment therefor, is something which no English or American lawyer would defend for a moment. But here is an instance where practically this wrong is inflicted. The fine awarded as a punishment in the civil action does not prevent indictment and prosecution in a criminal court. On the other hand, it has been held that evidence of punishment in a criminal suit is not admissible even in mitigation of exemplary damages in a civil action. *Cook v. Ellis*, 6 Hill, 466; *Edwards v. Leavitt*, 46 Vt. 126.

Courts attempt to explain away the apparent conflict with the constitutional inhibition above mentioned; they say that the language there used refers exclusively to criminal procedure and cannot include civil actions. *Brown v. Swineford*, *supra*. But this position amounts to a complete surrender of the evident spirit and intent of that instrument. When the convention framed, and when the people adopted, the constitution, both understood the purpose of this clause to be the prevention of double prosecutions for the same offense. Yet, under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution takes the form of a civil action, in which he is called defendant? He is practically harassed with two prosecutions and subjected to two convictions; while no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort he suffers two punishments.

An effort has been made to mitigate the undeniable hardship and injustice by declaring that juries in the second prosecution, whether it be civil or criminal in form, may consider the punishment already inflicted. But both reason and authority conclusively show that this proposition is illusory; that the application of such a rule is impracticable; and that the attempt to apply it, while producing confusion, would not effectively accomplish the purpose intended.

A second weighty objection to the rule under discussion relates to procedure. It is doubtful if another instance can be found within the whole range of English or American jurisprudence, where the distinctions between civil and criminal procedure are so completely ignored. Plaintiff sues for damages arising from the injury done to *himself*. His complaint or declaration is framed with a view to compensation for a purely private wrong; it need not be under oath, and does not inform defendant that he is to be tried for a public offense. The summons makes no mention of punishment; it simply commands defendant to appear and answer in damages for the private injury inflicted upon plaintiff. When the cause is called for trial, no issue upon a public criminal charge is fairly presented by the pleadings.

A trial and conviction are had, and punishment by fine is inflicted, without indictment or sworn information.

The rules of evidence peculiarly applicable in criminal prosecutions are rejected.

The doctrine of reasonable doubt is replaced by the rule controlling in civil actions, and a mere preponderance in the weight of testimony warrants conviction; defendant is compelled to testify against himself, and such forced testimony may produce the verdict under which he is punished; depositions may be read against him, and thus the right of meeting adverse witnesses face to face, be denied.

The law fixes a maximum punishment for criminal

offenses, and in this state the presiding judge determines the extent thereof, where a discretion is given; but under the rule we are considering, the jury are entirely free from control, except through the court's power — always unwillingly exercised — to set aside the verdict; they may, for an offense which is punishable under criminal statutes by \$100 fine at most, award as a punishment many times that sum.

And finally, when the defendant has been punished in the civil action, he is denied the privilege of pleading such expiation in bar of a criminal prosecution for the same offense. He can hope for no executive clemency in the civil suit; and if imprisoned upon the second conviction, under the authorities, *habeas corpus* does not lie to aid him.

The incongruities of this proceeding are not confined to the criminal branch of the law. Civil actions are instituted for the purpose of redressing private wrongs; it is the aim of civil jurisprudence to mete out as nearly exact justice as possible, between contending litigants; there ought to be no disposition to take from the defendant or give to the plaintiff more than equity and justice require.

Yet under this rule of damages these principles are forgotten, and judicial machinery is used for the avowed purpose of giving plaintiff that to which he has no shadow of right. He recovers full compensation for the injury to his person or property; for all direct and proximate losses occasioned by the tort; for the physical pain, if any, inflicted; for his mental agony, lacerated feelings, wounded sensibilities; and then in addition to the foregoing, he is allowed damages, which are awarded as a punishment of defendant and example to others. Who will undertake to give a valid reason why plaintiff, after being fully paid for all the injury inflicted upon his property, body, reputation and feelings, should still be compensated, above and beyond, for a wrong committed.

against the public at large! The idea is inconsistent with sound legal principles, and should never have found a lodgment in the law.

The reflecting lawyer is naturally curious to account for this "heresy" or "deformity," as it has been termed. Able and searching investigations, made by both jurist and writer, disclose the following facts concerning it, viz.: That it was entirely unknown to the civil law; that it never obtained a foothold in Scotland; that it finds no real sanction in the writings of Blackstone, Hammond, Comyns or Rutherford; that it was not recognized in the earlier English cases; that the supreme courts of New Hampshire, Massachusetts, Indiana, Iowa, Nebraska, Michigan and Georgia, have rejected it in whole or in part; that of late other states have falteringly retained it because "committed" so to do; that a few years ago it was correctly said, "At last accounts the court of queen's bench was still sitting hopelessly involved in the meshes of what Mr Justice Quain declared to be 'utterly inconsistent propositions.'" And that the rule is comparatively modern, resulting, in all probability, from a misconception of impassioned language and inaccurate expressions used by judges in some of the earlier English cases.

See Professor Greenleaf's response to Mr. Sedgwick's criticism of the former's views on this subject, 2 Greenl. Ev. p. 235 *et seq.*; also the opinion of the court, delivered by Mr. Justice Foster, in *Fay v. Parker*, 53 N. H. 342; and other authorities cited at the end of this discussion.

Mr. Parsons, while with evident reluctance sanctioning the rule, makes the following declaration: "We cannot believe that it was ever a principle of the ancient and genuine common law that damages should be punishment, or that the civil remedy for the wrong done should be punitive to the wrong-doer as well as compensative to the sufferer." 3 Parsons on Contracts (6th ed.), 171.

The words "smart money," and also the following

adjectives, have been used to designate this class of damages: *speculative*, *imaginary*, *presumptive*, *exemplary*, *vindictive*, and *punitive* or *punitory*. The literal meaning of all but the last three is easily reconcilable with the idea of compensation; they were so used in the first place; and even as to the excepted ones, there are many cases wherein it is evident they were employed without any intentional reference to punishment. These words all came into use through the beneficent design of courts to distinguish between private wrongs with, and those without, an evil intent, and to extend the right of recovery, in the former case, to injuries excluded from computation in the latter.

Mr. Justice Foster concludes a discussion of the expression *smart money*, as used by Grotius and jurists contemporary with that author, in the following language: "It is interesting, as well as instructive, to observe that one hundred and twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not as now, money required by way of punishment, and to make the wrong-doer smart." *Fay v. Parker, supra*.

So long as the jury are considering the material pecuniary injury, direct or approximate, shown by the evidence, and the physical pain, their inquiry relates to what are termed actual damages; but when authorized by a vicious intent of the wrong-doer, they turn to the realm of mental anguish, public indignity, wounded sensibility, etc., the damages awarded may more appropriately be described as *presumptive*, *speculative*, or *imaginary*. The injury in the latter case is no less actual or real than in the former, but it is less tangible; compensation therefor is more a matter of judgment, less a result of computation.

A misapprehension seems sometimes to exist as to the

word *compensatory*, when used in this connection. Under the rule limiting them to compensatory damages, juries will, with proper instructions, recognize a broad distinction between a tort unaccompanied by malice, or circumstances of aggravation or disgrace, and one producing equal direct pecuniary damage where either of these conditions exist. In the former case they consider only the actual injury to the person or property, including expenses, loss of time, bodily suffering, etc., occasioned by the wrongful act; in the latter, they allow such additional sum as in their judgment is warranted by the circumstances of contumely, anguish or oppression; but in both instances the damages are awarded as *compensation*; the additional sum is given to the individual as a recompense for the mental suffering, or wounded sensibilities, etc., as the case may be. It often happens that this constitutes the principal element of the recovery.

If, upon a crowded thoroughfare, one maliciously assaults me with blows and epithets, \$5 may fully compensate the injury inflicted to my person and clothing; but \$500 may be utterly inadequate to requite the sense of insult, the personal indignity, the public disgrace and humiliation. The extra \$500 exacted may operate indirectly as a punishment; it may constitute an example to others, and also deter my assailant himself from repetitions of the offense in future; in law, however, it is simply compensation for the private wrong; a kind of indemnity which probably no court has ever refused to allow, when warranted by the circumstances.

But under the doctrine of exemplary damages, as announced by the instruction given in this case, the jury are not required to stop with the \$5 for material injury, and \$500 for lacerated feelings. They may turn to the domain of criminal law, and consider the public wrong; and they may add \$1,000 more as a punishment to my assailant. The arrangement is highly satisfactory to me, since I have the pleasure of pocketing the additional thou-

sand dollars to which I am not entitled. But, as we have already seen, it hardly comports with correct legal principles.

The case at bar furnishes a good illustration of the doctrine under discussion. The jury are told that if they find certain facts to exist, they may award damages to plaintiff for:

- 1st. The actual pecuniary loss sustained.
- 2d. The peril occasioned in regard to personal liberty.
- 3d. The injury to his person and liberty.
- 4th. The injury to his feelings and reputation.
- 5th. The punishment of defendant.

The first four items comprise all the injuries for which plaintiff ought to recover; they all rest upon the theory of compensation for the private wrong, and are therefore in perfect harmony with the principles and procedure in civil actions; they furnish ample ground for discrimination by the jury, should they find the prosecution and imprisonment to have been malicious. Why not remit the punishment of defendant to a criminal forum?

The jury rendered a verdict for \$2,780. How much of this sum was given as a punishment? Perhaps \$1,000, perhaps more; yet under our Criminal Code, \$500 would have been the maximum. When defendant is on trial in the criminal court, he cannot plead in bar payment of this penalty; he must, if convicted, discharge the additional fine assessed, or go to jail, if such be the sentence. Whatever may be the technical distinctions, he is in fact twice prosecuted, twice convicted and twice punished for the same offense; and one of these prosecutions, convictions and punishments is had without any regard for the leading principles obtaining in criminal procedure.

Concerning defendant's liability to indictment for false imprisonment under our statute, see *Slomer v. People*, 25 Ill. 70.

We are not prepared to say with Mr. Field, that the controversy of the books about compensatory and exemplary damages "is one which relates more to the use of terms than to practical results" (Field on Damages, sec. 73); nor with Judge Cole of Iowa — for whose legal acumen and views we entertain profound respect — that the difference on this subject between Prof. Greenleaf and Mr. Sedgwick may be only a "controversy as to the terminology of the law, rather than as to the extent of the right of recovery, or the real measure of damages."

These remarks must be based upon the supposition that the jury would award as heavy damages under the liberal rule of compensation above stated, as they would with the added element of punishment; a conjecture which it seems to us is hardly defensible from a legal standpoint. We deem no further argument necessary to show that the question is one of weighty importance. That it affects the fundamental distinctions between civil and criminal procedure; that it bears directly upon the legal rights, and in many cases also upon the constitutional rights, of the citizen.

In some of the states, courts distinguish between cases where the tort is punishable as a crime, and those where it is malicious but not so punished; exemplary damages being denied in the former, but allowed in the latter. See Sutherland on Damages, p. 738, and cases cited.

This distinction rests upon the constitutional and humane objections to dual prosecutions and punishments for the same offense; but grave doubts may justly exist as to the wisdom of preserving it.

The impropriety of judicially recognizing as criminal, that which is not so by statute or at common law; the incongruity and confusion arising from trial and punishment under the rules of evidence, pleading and practice controlling in civil actions; the injustice of denying defendant the benefit of principles and procedure maintained in criminal prosecutions; the manifest inequity of

awarding plaintiff something to which he is not entitled,—these and other considerations may prove so powerful as ultimately to undermine everywhere the distinction above mentioned.

It may in the end be considered safer and better, in all cases, to keep the two forums separate and distinct; to let the public protect itself through legislation and the principles of the common law. It is not unlikely that courts will in the course of time generally condemn the practice of blending the interests of the individual with those of society, and using a purely private action to redress a public wrong.

The most difficult cases in which to exclude the rule of damages as a punishment are those where its application rests upon gross negligence, and where no criminal prosecution can be sustained; there is often a feeling that complete justice cannot be done without punitive satisfaction. But those courts which adhere to the doctrine of exemplary damages in general are by no means unanimous in applying it to this class of cases; and when so applied, the most guarded language is used, and the most careful limitations are imposed; it is said that the negligence must be “flagrant and culpable;” so much so that malice may “well be inferred or imputed to defendant.” Field on Damages, sec. 84, and cases cited.

Why may not even this class of cases be safely limited to the rule of compensation? Is not this doctrine, as above explained, sufficient to meet all the reasonable demands of justice?

But it is sufficient for us to say that, in the case at bar, the objections to double prosecutions and punishments for the same offense are decisive.

As already suggested, the distinction above considered is not merely verbal. It makes but little difference what adjective or expression is used to designate the damages beyond those termed *actual* which may be awarded by the jury for injury to the feelings when the wrong is

accompanied by malice, provided the instructions clearly indicate the proper limitation. But it is believed safer not to employ the words *exemplary*, *vindictive*, *punitory*, or either of them, as there is danger of misapprehension growing out of their literal meaning, notwithstanding the accompanying explanations of the court.

It has been with no little reluctance that we have arrived at the foregoing conclusion as to the doctrine of punitive or exemplary damages. The persuasive reasons and strong array of authorities in support of the rule, the corresponding convictions of a large part of the bench and bar of the state, and the confusion that may exist for a time, have impelled us to the most careful and conservative deliberation. But we feel that the doctrine of compensation, as explained, is more in consonance with the reason, the logic, the science of the law; that it is more in harmony with the dictates of equity and justice, and that the tendency of the courts and writers is favorable to its exclusive adoption,—more correctly speaking, *re-adoption*. We deem it wiser to accept and declare the rule now, than to resist for a time and ultimately be compelled to do so, when the confusion produced would be tenfold greater than at present is possible.

Upon the subjects embraced by the foregoing discussion, see the following authorities supporting or opposing the views adopted in this opinion: 2 Greenleaf's Evidence (13th ed.), text notes and cases, p. 235 *et seq.*; 1 Sutherland on Damages, text notes and cases, p. 716 *et seq.*; Field on Law of Damages, text notes and cases, p. 64 *et seq.*; Sedgwick on Meas. of Damages (6th ed.), text notes and cases, p. 552 *et seq.*; 3 Parsons on Contracts, text notes and cases, p. *169 *et seq.*; *Fay v. Parker*, 53 N. H. 342.

Several cases decided by this court refer directly or indirectly to the subject of exemplary damages, viz.: *Kinney v. Williams*, 1 Col. 191; *Nachtrieb v. Stoner*, 1 Col. 423; *K. P. R'y Co. v. Miller*, 2 Col. 442; *Western Union Telegraph Co. v. Eyser*, 2 Col. 141; *K. P. R'y Co. v. Lun-*

din, Adm'r, 3 Col. 94; *Wall et al. v. Cameron*, 6 Col. 275.

In none of these cases does there appear to have been a serious contest upon this subject, by counsel. It is not considered at any length, or fairly adjudicated, in either of the opinions, though they contain remarks which seem to recognize the doctrine. In five of the cases the judgments below were reversed—four by this court, and one by the supreme court of the United States; and with a single exception, the principal ground of reversal was error in submitting at all to the jury, this branch of the measure of damages. Therefore, for this reason, in four of those cases, it was not necessary to determine the question, since, if the rule were held to exist, it had no application. In one of the remaining two, the reference to this class of damages was a casual remark by the judge who wrote the opinion, not necessarily required by anything in the record. While in the sixth, the instruction considered, simply told the jury that, if malice existed, they were “not restricted to the mere *corporeal injury* of the party;” which is in perfect keeping with the rule of compensation above announced.

But if it can be truthfully claimed that the views herein expressed are not in harmony with those cases or either of them, we feel constrained to hold that, to the extent of such conflict, those opinions should be modified.

In view of a retrial in the court below, we deem it necessary to consider a few other questions presented by the record.

The term *probable cause*, as used in actions for malicious prosecution, has been defined as “such a state of facts, known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice, upon facts within the parties’ knowledge, to believe or entertain an honest and strong suspicion that the per-

son accused is guilty." Hill on Torts, sec. 18, and cases cited.

Analyzing this definition, we discover the reason for the rule that, in cases like the one before us, malice may be implied from a want of probable cause. Persons of sufficient age and sound mind are presumed in law to act with ordinary prudence and discretion. And as in many other cases where wrong and injury result from gross negligence, upon proof that there was no probable cause, the law supplies a criminal intent. One cannot procure the arrest and imprisonment of another, without any reasonable ground of suspicion, and then avoid liability for the disgrace and vexation produced, upon the plea of innocent intent. If he is really free from wrongful motive, and yet no probable cause, within the foregoing definition, exists, he should pay these damages for his indifference or carelessness concerning the rights of others.

Counsel will observe that all the circumstances, as they appeared to the prosecutor at the time, enter into the question; and that in determining whether or not probable cause existed, the jury, so far as possible, place themselves in the position of the prosecutor. This expression does not mean actual guilt, but such circumstances as warrant the prosecutor, acting as a man of reasonable caution and discretion, and free from malice or prejudice, in "entertaining an honest and strong suspicion that the person accused is guilty." See Field on Damages, sec. 690, and cases cited; *Stone v. Crocker*, 24 Pick. 81.

Adopting this view of the law, it follows that we must overrule counsel's remaining objection to the instruction already considered. So far as this objection is concerned, we think that this instruction, coupled with the other instructions given, fairly states the law.

But while it is correct to say that a wrongful intent may be implied from the absence of probable cause, it does not follow that all testimony of actual malice must

be excluded. It is true that if there be probable cause for the arrest, the prosecutor is not required to respond in damages, even though his mind may not be free from improper motive. Yet acts of the prosecutor, and circumstances connected with the transaction, affirmatively showing actual evil intent, may always be given in evidence. If a want of probable cause appear, the jury, in estimating damages, may properly consider the degree of malignity displayed by the prosecutor. If, through unreasonable and unnecessary abuse and oppression, the annoyance, contumely and sense of outrage inflicted are enlarged, heavier damages should be allowed, under the rule of compensation, than if the malice were wholly implied from the absence of probable cause.

We are therefore of opinion that no error was committed in receiving testimony as to what took place prior to appearance before the justice. This evidence was not admitted as a ground of damages in itself; under the pleadings it could not be so received. But the insults, oppression and duress thereby shown continued through the six or seven hours immediately preceding arrival at the justice's residence; they were closely connected with the proceedings before that officer, and bore directly upon the intent with which appellant acted in instituting such proceedings, and in procuring the warrant and subsequent imprisonment.

The sixth instruction, relating to the disposal of mortgaged property, should not have been given; it is not supported by any evidence in the cause, and its effect might possibly have been misleading to the jury.

In view of the uncontradicted evidence in behalf of the plaintiff below, now before us, we do not consider the verdict excessive; under a correct rule of damages, it would not be disturbed on account of the sum awarded. But we cannot say that a portion thereof was not given for the purpose of punishing appellant.

The judgment is reversed and the cause remanded for a new trial.

Reversed.

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10	228
7	556
13	291
7a	556
25	166

THE DENVER, WESTERN & PACIFIC RAILWAY COMPANY
v. WOY ET AL.

In this court briefs must be filed in accordance with the orders entered, or the causes will be subject to dismissal for want of prosecution.

Error to County Court of Boulder County.

THE case is stated in the opinion.

Messrs. TELLER and ORAHOOD, for plaintiffs in error.

Mr. R. H. WHITELY, for defendants in error.

By the Court. This cause was regularly submitted to the judgment of this court upon briefs to be filed, and a rule, specifying within what periods the several briefs were to be filed, was duly entered of record herein on the 16th day of February, 1883. Upon reaching the cause for decision we find that no briefs have been filed by either party. The writ of error will therefore be dismissed for failure to comply with the rule.

Suitors bringing causes here for review, and desiring the judgment of this court upon the errors assigned, must exercise diligence in their prosecution. Briefs must be filed in accordance with the orders entered, or the causes will be subject to dismissal for want of prosecution. Writ of error dismissed.

Dismissed.

MACKEY V. FULLERTON ET AL., ASSIGNEES OF SHERRICK
& LEWIS.

1. The rule of law is that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account, without any appropriation, the rule is that it should be applied to the first items in the account.

2. Wilful ignorance is equivalent in law to actual knowledge. He who abstains from inquiry, when inquiry ought to be made, cannot be heard to say so and rely upon his ignorance.

Appeal from District Court of Gilpin County.

THE facts are stated in the opinion.

Mr. J. E. ROCKWELL, for appellant.

Mr. W. C. FULLERTON, for appellees.

BECK, C. J. This was an action commenced by the appellees against the appellant in the county court of Gilpin county, for the recovery of a balance of \$510.06, alleged to be due the late firm of Sherrick & Lewis, upon an account for goods, wares and merchandise. There have been two trials of the cause, in each of which the plaintiffs recovered judgment for the full amount of their bill; first before the county court, and again before the district court of Gilpin county, the latter trial being by a jury.

Sherrick & Lewis were partners, doing business as merchants, in Nevadaville, in said Gilpin county, their stock in trade being groceries and miners' supplies. The defendant appears to have been a regular customer of said Sherrick & Lewis for a considerable time prior to their assignment to the appellees for the benefit of their creditors, which latter event occurred about the 1st day of September, 1881. The complaint alleges: "That defendant became indebted to said Sherrick & Lewis in the sum of \$510.06, for the balance of an account for goods, wares and merchandise sold and delivered to the defendant by said Sherrick & Lewis, between the 11th day of December, A. D. 1879, and the 25th day of August, A. D. 1881, at Nevadaville, in said county."

The defendant, answering, admitted that he was indebted in the sum of \$410.06, and denied his indebtedness as to the balance of the account.

After the appeal to the district court, he filed a further answer, by leave of the court, averring that the sum of \$100, in the account sued on, was for the pretended sale of a barn, situate upon ground belonging to the Monier Metallurgical Works in Nevada, and that said Sherrick & Lewis had no title to the property sold.

Prior to the commencement of the trial in the district court, the plaintiffs disclaimed, in open court, through their counsel, that any part of the amount sued on was for the sale of a barn, and declared that the entire account was for a balance due for groceries, hay, grain and miners' supplies. A record was made of these admissions, and, upon closing their evidence in chief, plaintiffs asked leave of the court to withdraw said admissions, which the court granted against the objections of the defendant, which ruling was excepted to and is assigned for error.

It is probable that the admissions were withdrawn for the reason that in the production of the books containing the defendant's entire accounts, a charge for the barn was found to be one of the items.

Upon examination of the testimony, we discover no necessity for the withdrawal of the admissions. The defendant appears to have been a regular customer of Sherrick & Lewis at their store in Nevadaville, and as was their custom, they presented their bills to him monthly, for groceries and miners' supplies. He paid to them sums of money upon account when convenient, which was credited, and the next bill would contain only the new items since purchased, together with the balance due upon the former bill.

The testimony showed that defendant's accounts ran through thirty-eight books, but that the books were balanced monthly, and that while bills were presented to customers every month, the items for one month were not repeated in the bill for the next month.

The books show a charge of \$100 against the defendant for a barn sold him in the month of November, 1880.

It would seem, however, under the general rule of law concerning the application of payments upon a running account, that the barn had been paid for, and, as a matter of fact, did not comprise a part of the account sued on.

The rule of law is, that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account without any appropriation, the rule is, that it should be applied to the first items in the account. 2 Pars. Contracts, 629, 631, 811; *Hill v. Robbins*, 22 Mich. 475; *Crompton v. Platt*, 105 Mass. 255.

The evidence upon the trial showed that the barn was sold to the defendant by the late firm of Sherrick & Lewis, on the 24th of November, 1880, and charged up to him upon the books of the firm in his general running account for merchandise, at the price of \$100. On the 1st of December following, defendant's account, including the price of the barn, amounted to the sum of \$315, for which several items a bill was then presented to the defendant by Mr. Sherrick, of said firm. The defendant received the bill and said he would pay it as soon as he got round to it. This witness testified that defendant paid this bill in full. That he paid \$200 on the 10th of December and \$151.60 on the 1st of January following, which two sums amounted to more than the bill rendered December 1st.

The witness testified further, that, although about seven monthly bills were presented the defendant from the time of the sale of the barn to the close of his account, but one bill contained the item of this sale. These statements clearly show an application by Sherrick & Lewis of the money paid by the defendant subsequent to December 1st upon the account then due, which was legal and proper, it not appearing that any direction to appropriate the payments otherwise were given by the

defendant, and it affirmatively appearing that the latter made no objection to the charge for the barn until after the assignment of Sherrick & Lewis to the plaintiffs on September 1, 1891.

It does not avail the defendant to say, as he did in his testimony, that he did not look at the bill of December 1st, presented him by Sherrick, and did not know that it contained the item of the barn. Wilful ignorance is equivalent, in law, to actual knowledge. A man who abstains from inquiry when inquiry ought to be made, cannot be heard to say so, and to rely upon his ignorance. Kerr on Fraud and Mistake, 237, 238.

Even if it were proper to litigate the subject of the sale of the barn in this action, the defendant has no available ground of error to complain of. His main defense is that he supposed he was buying the lot upon which the barn stood, as well as the barn, and was ready to pay \$100 therefor upon receiving a deed for the property, but that he had since learned that Sherrick & Lewis could not make title, as they did not own the lot.

Opposed to this is the testimony of Sherrick that he told defendant at time of sale that the Monier Metallurgical Works owned the lot.

The credibility of these two witnesses upon this point was submitted to the jury by the second instruction given by the court, and it was resolved against the defendant.

In short, the evidence shows that defendant bought the barn and paid for it; that another person, who was then occupying it, was turned out, and that the possession thereof was delivered to the defendant, who put his mules into it and occupied it as long as he desired. The effect of his defense to the present action is, to seek to recover back the sum paid therefor; for unless an offset of the \$100 is allowed, he is indebted upon the account for groceries and supplies in the sum of \$510.06, the sum sued for.

In no view of the case can he attack the title of the vendors of the barn in this proceeding. The matter of

the purchase and payment of the barn was voluntarily closed and settled by the parties before the assignment of Sherrick & Lewis to the plaintiffs, and as to the latter parties the matter was closed forever. The judgment is affirmed.

Affirmed.

BRUCKMAN V. TAUSSIG.

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80	872

1. In pleading a judgment of a court of general jurisdiction it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign or one of a court of a sister state. If the court had no jurisdiction, that fact should be raised by defendant's plea.
2. The code (1883, section 387) provides that printed copies in volumes of statutes, or other written law of any other state or territory or foreign government, purporting or proven to have been published by the authority thereof, shall be admitted by courts on all occasions as presumptive evidence of such laws.
3. Interest may be recovered on a judgment of the court of another state without any averment in the complaint that it is allowed by the statute of the state in which it was recovered.

Appeal from County Court of Lake County.

THE case is stated in the opinion.

Messrs. GEORGE and PHELPS, for appellant.

Mr. GEORGE H. KOHN, for appellee.

STONE, J. Action upon a judgment of the circuit court of the eighth judicial circuit of the state of Missouri.

Errors are assigned because the complaint failed to state facts in support of the jurisdiction of the Missouri court, and because such facts were not proved at the trial; because the book purporting to contain the statutes of the state of Missouri was received in evidence without proper authentication, and because interest was allowed on the Missouri judgment.

The complaint alleges that plaintiff, the appellee here, recovered judgment against the defendant in the circuit court, at the city of St. Louis, in the state of Missouri, "a court of general jurisdiction," on the 10th day of May, 1880, for \$399.18, and that no part of the same has been paid.

The approved precedents of declarations upon judgments state the date or term of the court at which the judgment was recovered, the court in which, and the place where, it was rendered, and the amount which, by the consideration of the court, the plaintiff has recovered. Freeman on Judgments, sec. 450.

It is an elementary rule that the jurisdiction of courts of general jurisdiction is to be presumed, and it follows that the judgments and decrees of such courts are, in all cases, of at least *prima facie* validity. In asserting such a judgment or decree as a cause of action, or as a ground of defense, the pleader need state no jurisdictional facts. "It was long ago settled that, in pleading a judgment, it is unnecessary to show by averment that the court had jurisdiction." Id. sec. 452. Indeed this doctrine is expressly embodied in our own statute. Civil Code (1883), sec. 69.

And the presumptions in favor of jurisdiction are the same whether the judgment relied on is domestic, foreign, or one of the sister states of this Union. If the court had no jurisdiction, that fact should be raised by defendant's plea. Id. sec. 453.

The transcript of the Missouri judgment received in evidence on the trial was duly authenticated, and proved all the jurisdictional facts necessary to be shown on the part of plaintiff below.

In respect to the volume from which was read in evidence the law establishing the said circuit court of Missouri, and conferring thereon general jurisdiction, the bill of exceptions recites that it was "a book purporting to contain the constitution and statutes of the state of

Missouri;" and in the absence of any other or further description, we must presume it to have been, and that the court below found it to be such a book as comes within the provisions of our own statute, which declares that "Printed copies in volumes of statutes, codes or other written law, of any territory or any other state or foreign government, purporting or proven to have been published by the authority thereof, * * * shall be admitted by courts and officers of this state on all occasions as presumptive evidence of such laws." Civil Code, 1883, sec. 387.

Interest was properly allowed by the court below on the judgment sued upon. The transcript shows that the Missouri court awarded interest at the legal rate on its judgment, and the amount of such judgment and accrued interest at the date of the judgment in the court below was certainly the proper amount due, and the correct measure of the latter judgment. In the case of *Warren v. McCarthy et al.* 25 Ill. 95, it is held, following the authority of *Prince v. Lamb*, Breese, 298, that interest may be recovered on a judgment of the court of another state, without any averment in the declaration that it is allowed by the statute of the state in which it was recovered, and even though the judgment of such other state does not award interest; that the law gives it as damages for the detention of the principal sum.

None of the assignments of error by appellant appear to have any support, and the judgment of the court below will be affirmed.

Affirmed.

SMALL ET AL. V. BISCHELBERGER.

7	563
3a	286

1. In Colorado there are two different proceedings by *certiorari*: One to review the action of an inferior tribunal, board or officer; the other to secure the trial *de novo* of causes previously heard by justices of the peace.

2. Where plaintiff, in an action pending before a justice of the peace, agrees, for a valuable consideration, to dismiss the action, and the defendant performs his part of the contract, but the plaintiff, in violation thereof, proceeds to judgment without defendant's knowledge, and purposely withholds execution and levy until the time for appeal has expired, the defendant may have his remedy by *certiorari*.
3. Upon motion to quash the writ of *certiorari* the averments thereof are admitted as in case of demurrer.
4. Under the statute, no issue can be made or tried as to the truthfulness of those averments in the petition which give the court jurisdiction, through the proceeding by *certiorari*, to try the cause *de novo*; the respondent's rights seem, in this particular, to be protected by the bond required of the petitioner, and the liability of the latter to prosecution for perjury if these averments are knowingly false.

Error to County Court of Pueblo County.

THE case is stated in the opinion.

MESSRS. WESCOTT and IRWIN, for plaintiffs in error.

MR. J. M. WALDRON, for defendant in error.

HELM, J. This cause was first tried before a justice of the peace; it was afterward removed to the county court by *certiorari* and there tried *de novo*; the proceedings in the latter court are now before us for review, upon error.

A preliminary question relating to the jurisdiction of county courts in connection with *certiorari* ought perhaps to be noticed. In this state there are two statutory proceedings under this title: one for the purpose of reviewing, under certain circumstances, the action of an inferior tribunal, board or officer; the other for the purpose of securing the trial *de novo* of causes previously heard by justices of the peace, where, without fault on his part, the petitioner is unable to take his appeal in the ordinary way. The former is provided for in chapter 29 of Dawson's Code; the latter in the General Statutes,

section 1992 *et seq.* Under the former, no justice, *county* or mayor's court can entertain jurisdiction; under the latter, the county court is expressly authorized to do so. Section 323 of the code, being a subsequent provision, might perhaps be construed as depriving the county court of the right to jurisdiction under any circumstances, were it not for the proviso in section 332 of that instrument. This proviso clearly preserves the system in the General Statutes, so far at least as county courts are concerned.

The *certiorari* proceeding now before us for review was had under the system provided in the General Statutes; hence there is no question as to the jurisdiction of the county court to issue this writ in a proper case. Section 1995 requires that petitioner shall show in his petition three things, viz.: *First*, that the judgment before the justice was not the result of negligence on his part; *second*, that the judgment, in his opinion, is erroneous and unjust, stating wherein such error and injustice consist; and *third*, that it was not in his power to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing.

No objection seems to have been made or argued in the county court, and none is argued here, as to the sufficiency of the petition in stating the second of the foregoing grounds; but a motion was interposed to quash the writ and dismiss the appeal upon insufficiency in the averments of the first and third.

The petition contained the following, among other statements: That on the day set for trial of the cause before the justice, but previous to the hour fixed, one of the defendants in error came to petitioner and proposed to dismiss the suit provided he would execute a certain deed theretofore placed in escrow; that he accepted the proposition, immediately executed said deed, and notified defendants in error that he had done so; that, relying upon the promise to dismiss, petitioner did not appear before the justice; but that instead of

dismissing the cause, plaintiffs in error, in violation of their agreement and in fraud of petitioner's rights, procured a judgment; that they withheld the levy of execution until after the time allowed by law for taking an appeal had expired, for the purpose of cutting him off from procuring a re-trial in the higher court; and that until the levy of execution, nineteen days after judgment, petitioner was wholly ignorant that the same had been rendered against him; he supposing all of the time that defendants in error had complied with their contract to dismiss the case.

We think the application to quash was properly overruled. For the purposes of this motion the foregoing matters stated in the petition must be taken as literally true.

The promise of Small, one of the partners and plaintiffs, to dismiss the action, was supported by a valuable consideration; it constituted the material feature, so far as they were concerned, of a valid and binding contract. Having fulfilled his part of this contract, and notified plaintiffs in the pending suit of such performance, petitioner had a right to rely upon the observance by them of their promise to dismiss; and under the circumstances, it was a fraud on their part to take the judgment. Suppose that, instead of executing the deed mentioned, petitioner had paid a sum of money agreed upon, in consideration of the promise to dismiss the suit; would any lawyer maintain that it was still his duty to attend before the justice and see that plaintiffs carried out their part of the contract? We think not; he would be perfectly justified, in either case, in presuming that they would treat him with the same good faith he had himself displayed.

It follows, of course, from this conclusion, that petitioner's neglect to take his appeal within the time allowed by law is excusable; for if the judgment against him was wrongfully and fraudulently obtained, and he had

no knowledge thereof, he cannot be held negligent for not taking an appeal in the ordinary way. Any doubts upon this subject would be removed by the averments of the petition that plaintiffs intentionally withheld the execution levy, for the purpose of preventing the appeal.

To deny the writ in this case would be allowing one to reap the benefit resulting from his own violation of a binding contract, where such breach thereof is characterized by bad faith amounting to fraud.

The case at bar is readily distinguishable from *Tilton v. Larimer County Ag. Association*, 6 Col. 288, cited by counsel. There the promise to dismiss was without any consideration whatever, and there was no legal obligation to perform; besides this fact, petitioner was a corporation, and the petition failed to name the individual to whom the promise was made; it also failed to state that such person had authority to act in the premises.

The court say: "If, the naked promise of a plaintiff to dismiss a pending action is sufficient to excuse a party defendant from any further attention to the case, it certainly can only have this effect when made to some one duly authorized to represent the defendant."

The foregoing discussion is based upon the principle already stated, that, for the purposes of the motion to quash, the averments of the petition are assumed to be true. But it appears that after denial of this motion, and before the trial, plaintiffs in error offered to prove, by witnesses then present, that many of the averments were wholly false; this the court refused to allow, and upon such refusal rests the second assignment of error.

Two cases are cited by counsel which seem to sustain the propriety of the proceeding proposed, viz.: *The State v. Woodward*, 9 N. J. L. R. 21, and *Rutland v. County Commissioners*, 20 Pick. 71.

We are unable to learn from an examination of these cases whether those *certiorari* proceedings were statutory or under the common law. Certain it is that the

procedure there considered was different from that which we have. Counsel frankly admit that statutes exactly similar to ours have received a construction conflicting with the one they now urge upon us. In *Davis v. Randall et al.* 26 Ill. 243, the court declare that "there is no provision in the statute authorizing a writ of *certiorari* to bring up proceedings from a justice of the peace, which allows affidavits to be read in support of or against the petition for such purpose. That must stand on its own merits, and be tested by itself, without extraneous support."

We find nothing in the statutes under which the writ in this case was issued authorizing a trial, by affidavit or testimony, of the truthfulness of the matters averred in the petition on the subject of negligence at the trial, or of failure to take an appeal in the ordinary way; and we are not at liberty to supply the requisite legislative provision.

Our answer to the clear and cogent suggestions of counsel must be, that a sufficient bond is required, and, as in ordinary appeals, no substantial injustice should result in the end; also, that the petition must be under oath, and petitioner is liable to prosecution for perjury if its averments are knowingly false.

We now discover no objection to the law announced in *Finnerty et al. v. Fritz*, 5 Col. 179, and other cases cited. But we do not think that the record brings this cause within the principle of agency, upon which counsel rely.

The third and last assignment of error which we shall consider challenges the findings and judgment, as being contrary to the weight of evidence.

Without reviewing in full the evidence, it is sufficient for us to say that we would not be warranted thereby in disturbing the judgment. There is testimony to uphold the theory of counsel for plaintiffs in error, but it is disputed, and the judgment may well be permitted to stand. It is certain that the sale of the land was never consum-

mated, and that defendant in error has received no purchase money. To reverse the judgment, we would have to find that the commission was not payable out of the proceeds; that plaintiffs in error brought a responsible and willing purchaser, acceptable to defendant in error, upon satisfactory terms; and that, solely through the negligence or default of defendant in error, the sale was prevented. This we are not prepared to do, and the judgment is affirmed.

Affirmed.

THE SAXONIA MINING AND REDUCTION COMPANY V. COOK.

1. Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term without fault on his part, he has a right of recovery, either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge.
2. In an action for a breach of contract, in such case, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing.
3. In such case the plaintiff cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable efforts to secure labor elsewhere. If he secures labor, or by reasonable diligence might have done so, the amount received, or that might have been received, must be deducted from the amount of damages occasioned by the breach of the contract.
4. While the defendant may mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is on the defendant.
5. The power of a general agent cannot be restricted by secret instructions of his principal, so as to affect a party dealing with such agent, without notice of the covert instructions.
6. In pleading, ultimate and not evidential facts must be stated. A breach must be stated, or there is no cause of action shown. The essential facts must be stated in unequivocal language, and not left to be inferred. The plaintiff is not at liberty to make out his case by proving facts not alleged in his complaint.

7	569
15	370
7	569
17	578
7	569
4a	496
7	569
9a	586
7	569
34	296

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. DECKER and YONLEY, for appellant.

Messrs. INGERSOLL and CRATER, for appellee.

STONE, J. The only question one need to consider in this case is, whether the complaint is sufficient to support the judgment. The complaint contains two counts, the second of which is wholly insufficient for any purpose, and cuts no figure in the case. The first count is as follows, viz.: "The said plaintiff, complaining of the said defendant, complains and alleges: That on the 27th day of May, 1880, the said defendant entered into a certain agreement with the plaintiff, in and by which the said defendant hired and employed the said plaintiff for the term and period of one year from the 15th day of April, 1880, to do and perform certain service and labor, and promised and agreed then and thereby to pay the said plaintiff the sum of \$125 per month for the first three months of said term, and the sum of \$150 per month for the remaining months of said term; that the said plaintiff then and there, in pursuance thereof, entered into the employment of said company, and performed the service required, and is still able and willing to comply with the terms of said agreement, upon his part to be kept and performed. That the said defendant neglects and refuses to keep and perform its said agreement, to the damage of this plaintiff of the sum of \$1,090. That no part thereof has been paid."

The answer of the defendant company below is a specific denial of each and every of the allegations of the complaint, as above set forth, and further "denies that it is indebted to the plaintiff upon any contract whatsoever, or for work and labor performed by the plaintiff for the defendant; but says that whatever labor has been

performed by plaintiff for the defendant, has been paid for by the defendant and received by the plaintiff, in full satisfaction and discharge of said work and labor."

The facts established by the evidence on trial are, that the plaintiff was engaged by the defendant to perform services of work and labor as refiner in the smelting works of the defendant company for the term of one year from April 15, 1880, upon the terms as to wages the same as alleged in the complaint; that in accordance with this engagement, plaintiff entered upon said work and performed the same in a satisfactory manner up to the 7th of August, 1880; that he was paid for the same from time to time at the rate aforesaid; that on the said 7th of August he was paid in full for services up to that date, when the works were closed by the defendant, and plaintiff, with the other employees of the works, was discharged, the only reason for such discharge being that the defendant chose to shut down the works on account of alleged dissatisfaction with the superintendent of the company; that thereafter the plaintiff remained at the locality of the defendant's works, where he had been employed, until the spring of the next year, 1881, without engaging in other work; that from November 1, 1880, until March 1, 1881, he had the keys of said smelting works, and during that time did some work without being specially re-engaged by defendant, and without having been paid anything therefor; that the keys were given him by the same superintendent who engaged him on behalf of the company in the first place, and that this latter work was done by direction of said superintendent; that he did no work after the 25th of February, 1881, for the reason that no more work was provided by defendant for him to do.

The only matters of defense set up by defendant on the trial were, *first*, that the said superintendent was not authorized to employ plaintiff or any other employee, except on condition that such employee might be discharged

at the pleasure of the president of the company (who resided outside the state of Colorado), or upon one day's notice; but with this condition, said superintendent had "full and complete power from the defendant company to hire, employ and discharge any and all workmen or employees of said company;" and *second*, that the plaintiff was discharged and paid in full on the 7th of August, 1880, and that therefore defendant was not liable to plaintiff for anything after that date. Plaintiff admitted payment in full to said date for services rendered up to that time, but testified that he did not understand that he was discharged under the contract.

The suit was brought before the expiration of the year for which plaintiff claims he was engaged, to wit: October 22, 1880. The trial was held in December, 1881.

Where one is employed to serve for a definite term; as for a year, and is discharged before the expiration of the term, without fault on his part, he has a right of recovery either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge. "A person employing another for a definite term is bound to provide him with labor for the whole term, and cannot deduct from the wages of the servant for time that he was not at work, when the failure results from his own fault. The fact that the business proves unprofitable is no excuse; if the master chooses to go out of the business, he can do so, but must pay the servant his actual damages for not employing him for the stipulated term." Wood's Law of Master and Servant, sec. 97, and cases cited.

When a servant is discharged without a sufficient legal excuse before the expiration of his term, he has his choice of two remedies: he may treat the contract as rescinded, and at once bring an action for the value of the services rendered; or he may treat the contract as continuing, and sue for a breach thereof, and recover his probable damages occasioned by the breach, or in some

cases he may defer suit until the end of the term, and sue for the actual damage he has sustained, which, however, can in no case exceed the wages for the entire term. *Id.* sec. 125, and authorities cited; Smith, Master and Servant, p. 91; Sutherland on Damages, p. 471.

Under the remedy in the latter class of cases, *i. e.*, where the action is for breach of the contract, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, to be established by proof, although the amount of the agreed wages may be taken as the measure of damages, *prima facie*, or in the absence of any other showing. He cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable efforts to secure labor elsewhere. If he has secured labor elsewhere, or by reasonable diligence might have done so, the amount received, or that might have been received, for such labor, is to be deducted from the amount of the damages occasioned by the breach of the contract sued upon. Wood, Master and Servant, sec. 125, and cases cited; 2 Sutherland on Damages, p. 473.

But while the defendant in such case is entitled to mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is upon the defendant. *Id.* sec. 132; *Howard v. Daly*, 6 N. Y. 362; *Barker v. Knickerbocker Life Ins. Co.* 24 Wis., 630.

The instruction to the superintendent by the president of the defendant company, limiting the power of the former to employ only on condition that the person employed could be discharged at will, was no defense, under the facts in this case.

The power of a general agent cannot be restricted by secret instructions of his principal so as to affect a party dealing with such agent, without notice of the covert instructions. *Scales v. Paine & Co.* 13 Neb. 521.

Tested by the foregoing rules of law, and under the facts of the case presented by the record, the appellee undoubtedly had a right of action against appellant at the time of commencing his suit. But testing the complaint by the same rules, we cannot pronounce it sufficient to sustain the judgment rendered thereon. There is not averred a sufficient cause of action to either inform the defendant of the precise ground upon which recovery was sought, and which the defendant was called upon to defend, or to warrant the rendition of a judgment for either of the two causes of action, to wit: wages due for actual services rendered, or damages for breach of the contract.

Since the facts established by the evidence in the case show that nothing was due plaintiff as wages for services actually rendered prior to the commencement of the suit on the 22d day of October, 1880, it may perhaps be fairly presumed that the object of the suit was to recover damages for a breach of the contract. But no breach is sufficiently set out. The averment that "the defendant neglects and refuses to keep and perform its said agreement, to the damage of the plaintiff," etc., is insufficient. Did the pleader intend by this averment to allege a breach of the contract to pay the certain wages stipulated, or the contract to employ for a year? Or was it intended to cover both?

As we have seen, the servant can have but one action — either for wages due, or for damages; he cannot have both. *Howard v. Daly, supra*. In the case before us the cause of action of the plaintiff was clearly not for wages, but for damages for breach of the contract. The defect in the complaint is not cured by the mere abolition of *forms* of action under the code practice. The allegation of the very cause of action is wanting. The code requires that the complaint shall contain "a statement of *the facts constituting* the cause of action." The facts constituting the breach should have been alleged; not the

evidence of those facts, but simply a clear and concise statement of such facts; ultimate, not evidential facts, must be pleaded. In other words, if the breach consisted in a wrongful discharge of the plaintiff by the defendant before the end of the term of employment, such wrongful discharge, as a breach of the contract, should have been averred as the fact constituting the cause of action.

"Clearly a breach must be stated, or there is no cause of action shown; the essential facts must be stated in unequivocal language and not left to be inferred." *Moore v. Besse*, 30 Cal. 570.

The case of *Van Schaick v. Winne et al.* 16 Barb. 90, presents a question which is on all-fours with the one we are considering. There the only averment of a breach was that the defendant "failed to fulfil his obligations by virtue of said instrument." The court held this wholly insufficient, and that it was a mere conclusion of law, to be derived from the facts when they are made to appear, and was not an issuable fact. The court say, further, "The plaintiff should have stated such facts as, if controverted, he intended to prove, to show a breach of the agreement. * * * To say that he has failed to fulfil his obligations, is no more than saying that he has broken his contract, or that the plaintiff is entitled to judgment. It involves no question of fact. It is merely the plaintiff's inference from a state of facts which he has not thought fit to disclose." The same rule is laid down by Mr. Bliss in his work on code pleading, section 210. The plaintiff is not at liberty to make out his case by proving facts not alleged in his complaint. *Bristol v. R. & S. Ry Co.* 9 Barb. 158. So in the case at bar, here was no issuable fact pleaded, and the denials of the answer put the case to trial upon an immaterial issue, or rather no issue, as to the cause of action. Judging from the specific sum claimed in the complaint, to wit, \$1,090, and the sum for which judgment was rendered, viz., \$1,050, and also looking to the instructions of the court

given on the trial, it would appear that the verdict and judgment were based on some exact computation of wages due under the contract for both actual and constructive services for a specific time, including the services which the plaintiff testified that he rendered after the commencement of the suit, and hence such judgment is in violation of the rules of law herein laid down as governing such cases, and cannot be allowed to stand. Had the case been tried upon proper issues, we do not think the assignments of error which go to the evidence allowed by the court on behalf of the plaintiff would be well taken.

The judgment will be reversed and the cause remanded.

Reversed.

BROOKS V. BATES ET AL.

1. In a complaint it is not proper to anticipate a defense, and, upon motion to strike out, such matters should be rejected.
2. The statute of limitations does not run against a creditor who is prevented by a superior law from bringing his action.
3. Where a plaintiff, for the purpose of avoiding defendant's plea of the statute of limitations, avers in his replication the pendency of voluntary proceedings under the bankrupt law by the defendant, the claim sued upon being a provable one in the bankruptcy court, it further devolves upon plaintiff to also sufficiently aver that the same has not been proved therein.
4. The court in bankruptcy may, under the statute, upon application of the bankrupt, restrain proceedings of a creditor in the state court, upon a provable claim, where there has been no unreasonable delay by the bankrupt in procuring his discharge. But if the bankrupt neglects to invoke the aid of the bankruptcy court in that way, no valid objection exists to the state court adjudicating the question when properly presented therein.

Error to District Court of Arapahoe County.

THE case is stated in the opinion.

Messrs. STALLCUP, LUTHE and SHAFFORTH, for plaintiff in error.

Mr. M. B. CARPENTER, for defendants in error.

HELM, J. The motion to strike certain averments from the complaint was properly sustained. These averments related to the statute of limitations; their purpose was to show that no bar of the action had arisen thereunder. This was anticipating a defense of which advantage might not be taken. Without the rejected matter, the complaint stated a cause of action; upon its face no bar was disclosed by virtue of any existing limitation statute; no new promise was relied on; hence by no possible construction would a special demurrer lie thereto, under the rule stated in *Buckingham v. Orr*, 6 Col. 387. The matters averred were wholly unnecessary, and were appropriately reached by the motion to strike.

The second assignment of error is not so easily disposed of. Defendant W. L. Bates, in his answer, for a second defense pleads the statute of limitations; he invokes the benefit of the sixteenth section thereof, as it existed prior to 1879; this section referred to causes of action upon contracts accruing without the state, and operated to prevent a recovery where pleaded, in suits begun upon such causes of action over two years after the same matured.

Plaintiff, by his amended replication, first pleaded facts which, if true, would have avoided the plea of the statute, viz.: that defendant did not become a resident or citizen of Colorado; that he was never in the state, even, until after the sixteenth section aforesaid had been repealed. Then, as a second ground of replication, he averred that defendant was duly adjudged a bankrupt by the United States district court for the northern district of Illinois, in proceedings under the national bankruptcy act then in force; that the note upon which plaintiff brought this suit was a claim provable in said.

proceedings; that defendant had never been discharged in bankruptcy, and that he had unreasonably delayed taking the necessary steps to procure such discharge.

The object of the latter plea was to show that before the unreasonable delay above mentioned, plaintiff could have brought no independent action in Colorado upon the note; and therefore, that in any event, being prevented by a superior law from bringing suit, the statute of limitations aforesaid did not run against him, but that, by defendant's delay under the bankruptcy law, a right to maintain this suit finally sprung into existence. See *Greenwald v. Appell*, 3 Col. L. R. 552.

To the replication a demurrer was filed. The theory maintained in support of this demurrer is that, if plaintiff's claim was actually *proved* in the bankruptcy court, he was thereby estopped from maintaining another action therefor; that whether the claim were so proven or not, that court was the only forum which had jurisdiction to determine the question of unreasonable delay on the part of the bankrupt in procuring his discharge; and that its consent was an essential prerequisite to suit before any other tribunal, upon the note here declared on.

Thus three questions are presented by this demurrer: *First*. Was it necessary for plaintiff to aver in his replication an omission to prove his claim in the bankruptcy court, and, if necessary, did he sufficiently do so? *Second*. Is that the only tribunal clothed with power to determine whether or not there has been the "unreasonable delay" mentioned by statute in procuring a release in bankruptcy? And *third*, should the replication have contained an averment of consent first obtained from the court of bankruptcy, to bring this action?

We assume, of course, that plaintiff was duly served with the usual creditor's notice of the bankruptcy proceeding.

The first of the foregoing questions arises under section 5105, Revised Statutes of the United States, which

was a part of section 21 of the bankruptcy act of 1867, and reads as follows: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him." * *

This, like nearly every other provision of the statute, has received judicial construction, though its language is so plain that it hardly seems to admit of conflicting views. Without reviewing or comparing cases, we shall simply adopt the conclusion reached in *Dingee v. Becker*, 9 B. Reg. 508, interpreting this provision in the light of the entire act. "If the bankrupt unreasonably delays his application for a discharge, or is guilty of laches in his efforts to bring it to a conclusion, the creditor who has proved his debt *is still incapable of proceeding elsewhere without permission of the court of bankruptcy.*" * * *

The reason for this construction is that, under the law, a creditor who proves his claim in the bankruptcy proceeding thereby voluntarily submits to the jurisdiction of the bankrupt court, and waives any right he might have had to maintain, upon his own volition merely, a suit elsewhere.

It was, in our judgment, necessary for plaintiff to show in his replication that his claim had not been proved, or to aver consent to sue elsewhere, first obtained from the bankruptcy court. But we think the former fact was sufficiently pleaded.

Provable claims are practically divided by the bankruptcy act according to *status* before the bankruptcy court, into two classes, viz.: those which have been proved, and those which have never been presented therein. The foregoing provision of the statute is confined to the former; the succeeding section applies to the latter. This succeeding section, as we shall presently see, uses the term "provable," to distinguish from the class of claims alluded to in the preceding section, as

well as in contradistinction to claims that could not be proved in the court of bankruptcy; and when plaintiff in his replication declares that the note in suit is a provable claim, following such declaration with the averment of unreasonable delay, it is apparent that he intends to place himself within the purview of the latter section. We think the pleading sufficiently accomplishes this purpose; it was hardly necessary to add the negative averment, that the claim had not been proved in the bankruptcy proceeding.

The alleged fact is in issue; and upon the trial, if defendant offers evidence establishing the proof of the note in the court of bankruptcy, this action will be defeated.

The remaining points presented by the demurrer are closely connected, and cannot well be considered separately. The statutory provision last above mentioned is section 5106, Revised Statutes of the United States, which is also the latter part of section 21 aforesaid. It declares that "no creditor whose claim is *provable* shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of discharge shall have been determined; and any such suit or proceeding shall, upon application of the bankrupt, be stayed to await his discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." * * *

Counsel differ as to the meaning of the words "to prosecute," used in the foregoing section. Our view is that these words relate equally to suits brought before the bankruptcy proceeding and those instituted while it is pending.

It would be a narrow construction to limit this expression, and consequently the entire section, to the former class of cases. The legal meaning of the phrase "to prosecute" is "to proceed against judicially." Had congress intended to confine this provision to suits begun before the proceeding in bankruptcy, the insertion of two

words at most would have placed such purpose beyond cavil; but the context and spirit of the whole act sustain our interpretation of the words.

It is not clear, from the language used, whether the suit mentioned in the statute is to be stayed by a restraining order from the bankruptcy court, or by order of the court in which it is pending. The statute simply says, "such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy." * * * It fails to designate the forum in which this application of the bankrupt shall be made. Therefore we are not aided by this expression in determining the question under consideration.

If a state court has power to say, in suits like the one at bar, when the unreasonable delay mentioned by the statute exists, in our judgment, no previous consent of the court in bankruptcy is essential to the bringing of a creditor's action in the proper tribunal. So, when we have answered the second question raised by the demurrer, we have answered the third also.

There is excellent reason for saying that the bankruptcy court is the only proper tribunal to determine whether or not the bankrupt has been guilty of unreasonable delay in procuring his release. For that court is most familiar with all the proceedings in bankruptcy and best prepared to give intelligent judgment in the premises. Upon this theory, and upon principle, also, such courts have taken jurisdiction to temporarily restrain parties from proceeding in actions pending before state courts, upon "provable claims" which had not been proved as well as those which had been. *In re Schwartz*, 14 Blatchf. 196. See, also, *Phelps v. Selleck*, 8 B. Reg. 390, and likewise cases hereinafter referred to.

On the other hand, it is said that "The creditor who has not proved his debt has no *status* in the court of bankruptcy. He has never submitted to its jurisdiction, and his right to proceed is no further affected than it is

affected by the restraining words of the statute. But this restraint is, by the very words of the statute, subject to a condition, and that condition is that the restraint shall not exist if the bankrupt does not use reasonable diligence to obtain his discharge. * * *

"In the case, therefore, of a creditor who has not proved his debt, there is no reason for sending him into the court of bankruptcy to apply for permission to proceed. If there has been unreasonable delay, the proceedings in bankruptcy do not arrest his suit, and he has a right to proceed, which he has not surrendered by any act of his, and which the law has not taken away from him. * * * In such a case, therefore, the question of unreasonable delay must necessarily be a question to be determined by the court in which the creditor's action is pending." *Dingee v. Becker, supra*. See, also, adopting a similar interpretation, *Calvert v. Peebles*, 80 N. C. 334. In the latter case the suit was begun before proceedings in bankruptcy were instituted; but under our view, above declared, of the statute, this fact does not affect the question. In *National Bank of Clinton v. Taylor*, 120 Mass. 124, the action was stayed by application in the state court.

We are disposed to adopt the conclusion reached in the case of *Dingee v. Becker, supra*, to the extent of holding that, under circumstances presently stated, the state court may decide the question, though we do not concur in all the reasoning of that decision. We are not prepared to deny the entire jurisdiction of the bankruptcy court over creditors who have received the statutory notice of the proceeding therein, but have not yet presented their claims.

We intimate no opinion adverse to the propriety of a temporary restraining order issuing in cases like this from the bankruptcy court. The authority of that tribunal to restrain *parties litigant* in the state courts, whenever it was necessary to accomplish the purpose

designed by the bankruptcy act, seems to have been thoroughly established. See Bump's Law and Practice of Bankruptcy (10th ed.), 227 *et seq.*, 698 *et seq.*; also, 327 and 335. In a majority of the cases mentioned by Mr. Bump the injunction issued to prevent the enforcement of liens against the bankrupt's property, but in some instances the writ simply restrained the prosecution to judgment of suits like the one before us.

But if the bankrupt does not see fit, by his application to the court in bankruptcy, for an injunction to there settle the question of unreasonable delay, why should the state court be estopped from considering the subject? Why may he not, by his failure to act, waive a right to the statutory stay of proceedings through process issuing from the bankruptcy court? There seems to be no inconsistency in holding that, in the absence of such effort by him in that forum, the state court in which the action is pending may, under circumstances such as are here presented, take jurisdiction to determine this question.

Bearing upon the subject last discussed, see cases cited in Bump's Practice, page 702 *et seq.*

From the foregoing views, it follows that, in our opinion, the demurrer ought not to have been sustained.

The judgment will therefore be reversed and the cause remanded.

Reversed.

HUGHES V. BREWER.

7	583
19	580

1. In an action by an assignee of a judgment, an averment of the assignment of the judgment is necessary, and a denial of the averment necessarily presents a material issue.
2. The defendant has the right to controvert and put in issue every material averment of the complaint. This is to be done by means of specific denials, and such denials may be made upon information and belief, when the facts are not presumptively within the defendant's knowledge.
3. Whether an assignment of a judgment is *bona fide*, and the plaintiff the owner of the judgment at the time of action brought, are facts

presumptively within the knowledge of the plaintiff, but not presumptively within the knowledge of the defendant.

4. There is nothing in the statute requiring the jurisdictional averment to be in a prescribed form in an action in a county court. The requirements of the statute are satisfied by averments in the complaint which are equivalent to an allegation that the amount in controversy does not exceed \$2,000.

Appeal from County Court of Arapahoe County.

THE case is stated in the opinion.

Mr. J. P. BROCKWAY, for appellant.

Mr. C. W. WRIGHT, for appellee.

BECK, C. J. This was an action upon a judgment rendered by the district court of Albany county, Wyoming territory, in favor of one John McLean, and against the appellant Hughes.

The action was brought in the court below by the appellee Brewer, who alleged in his complaint that said judgment had been assigned to him for a valuable consideration, and that no part of the judgment had been paid.

The questions of law involved arise upon the answer of the defendant Hughes and the rulings and action of the county court therein.

The answer is as follows: "And now comes the said defendant, and, for answer to the said plaintiff's complaint herein, says that as to the allegation in said complaint, 'that on the 2d day of December, A. D. 1880, for a valuable consideration by said plaintiff, Brewer, unto the said McLean paid, the said John McLean did assign and convey unto plaintiff the judgment,' defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies that said plaintiff paid said McLean anything whatever for said judgment, and denies that the said

judgment was assigned by said McLean to said Brewer; and denies that said Brewer is the owner of said judgment; and avers that said McLean is now the real owner of said judgment; and avers that said McLean is the real party in interest in this suit; wherefore, defendant demands that he be allowed to go hence without day and have judgment for his costs in this suit."

The answer was properly verified. The plaintiff moved the court to strike the answer from the files, and for judgment for want of an answer, on the ground that the answer was a sham pleading and sought to raise an immaterial issue.

The court sustained the motion and gave judgment upon the complaint for the amount of the plaintiff's demand, to which ruling and action of the court the defendant duly excepted.

Two questions are presented for our consideration by the assignment of errors, viz.: *First*. Did the court err in striking the answer from the files? *Second*. Were the allegations of the complaint sufficient to invest the court with jurisdiction of the subject-matter of the controversy?

The objection to the answer, that it presents an immaterial issue, cannot be sustained. The averments that the judgment was not assigned by McLean to Brewer; that Brewer is not the owner of the judgment, and that McLean is the owner of the judgment, go directly to the plaintiff's right of action. His right of action depends upon the averment of the complaint, that the judgment has been assigned to him, and proof of that fact is essential to a recovery of a judgment in his favor against the defendant.

This being so, a denial of the truth of the allegation necessarily presents a material issue. It only remains, therefore, to inquire whether the denial as pleaded was in proper form.

The answer was made upon information and belief, and

it is probable that the court adjudged it to be a sham pleading because the averments contained therein were not in the positive form. The provision of the Civil Code upon this subject is as follows: "In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue, for the defendant to state, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a belief." Code, Revision 1883, sec. 61.

Whether a *bona fide* assignment of the judgment had been made to the plaintiff, and whether the plaintiff was the owner thereof, at the time of bringing his suit, were facts presumptively within the knowledge of the plaintiff, but not presumptively within the knowledge of the defendant.

The defendant has the right to controvert and put in issue every material averment of the complaint. This is to be done by means of specific denials, and such denials may be made upon information and belief, when the facts are not presumptively within the defendant's knowledge.

It does not appear from the record that the court below had any other information that the defendant's answer was a sham than the answer itself, which, being in substance and form in compliance with the requirements of the statute, was sufficient to put in issue the allegations of the complaint which it denied.

The action of the court, therefore, in striking the answer from the files and rendering judgment upon the complaint, was not a mere irregularity, as insisted upon by one of the counsel for the appellee, but an error which affected the substantial rights of the appellant.

The next question is, whether the allegations of the complaint were sufficient to give the county court jurisdiction of the case.

The objection to the complaint is, that it fails to allege, in the words of the statute, that the amount in contro-

versy did not exceed the sum of \$2,000. Gen. Laws 1883, p. 244, sec. 2. There is nothing in the section referred to that indicates an intention to require the jurisdictional averment to be in a prescribed form. The import of the language employed therein is, that it must affirmatively appear from the complaint that the value of the property in controversy, or the amount involved, for which relief is sought, does not exceed the sum of \$2,000.

The effect of the ruling in *Barndollar v. Patton*, 5 Col. 46, is that the requirement of the statute was satisfied by averments of the complaint which were equivalent to an allegation that the amount in controversy did not exceed the sum of \$2,000.

In *Home v. Duff*, *id.* 574, an action for possession of a mining claim, together with damages for its detention, in which case there was no allegation of the value of the property involved, we held it to be essential to the jurisdiction of a county court that the complaint contain an allegation that the value of the property does not exceed \$2,000, or that it contain an equivalent allegation.

Applying the principle announced in the above cases to the case at bar, we have no difficulty in holding that the statutory requirement has been substantially complied with. It affirmatively appears from the complaint that the relief demanded is a money judgment, and that the amount involved, for which relief is sought, is the sum of \$283.29, with interest thereon at the rate of twelve per centum per annum from the 14th day of August, 1879. Judgment is demanded for said sum of money, and interest thereon at the rate and for the time stated.

Judgment was rendered for the plaintiff on the 31st day of January, 1881, for the sum of \$335.65, that being the amount of principal and interest then due.

It affirmatively appearing, therefore, from the allegations of the complaint, that the amount involved, for which relief was sought, was within the jurisdiction of

the court, we hold that the error in this behalf was not well assigned.

On account of the error first assigned, the judgment will be reversed and the cause remanded.

Reversed.

7 588
7a 463

POIRE V. THE ROCKY MOUNTAIN TRANSPORTATION COMPANY.

A referee was directed to try the issues presented and report findings upon the law and facts; exceptions were reserved and subsequently overruled, and judgment entered by the court on the referee's report; but no exceptions being reserved either to the ruling upon the issues presented by the report and the exceptions thereto nor to the final judgment rendered by the court, *held* that this court is precluded from reviewing the judgment on the evidence.

Error to District Court of Lake County.

THE case is stated in the opinion.

Mr. T. A. GREEN and Mr. C. H. ST. JOHN, for plaintiff in error.

Mr. C. W. WRIGHT, for defendant in error.

Per Curiam: This cause was by consent of parties referred. The referee was directed to try the issues presented and report findings of law and fact thereon.

This he did; and exceptions being filed to his findings, the court, upon due consideration thereof, overruled such exceptions, and entered judgment upon the referee's report. To reverse that judgment the cause is now before us on error.

The principal issue tried by the court below, being one of fact, was whether or not the indorsement and transfer by plaintiff of the note mentioned in the pleadings was procured by duress. This issue was found against plaintiff in error, who was plaintiff below.

No exception was preserved either to the ruling upon the issues presented by the report and the exceptions thereto, or to the final judgment rendered in the district court. Therefore we are precluded from reviewing this judgment upon the evidence; *i. e.*, from determining whether or not it is supported thereby. *Martin v. Force*, 3 Col. 199; *Law v. Brinker*, 6 id. 555; *Breen v. Richardson*, 6 id. 605.

No bill of exceptions was taken or preserved, and the evidence contained in the record was not properly authenticated. Hence this court sustained a motion to strike out the same.

There being no evidence before us, we cannot consider any exceptions that may have been saved at the trial to the admission or rejection of testimony, and we must presume that the finding of the referee upon the question of fact aforesaid was correct.

But if this finding was right, nothing remains for us to consider. The only other matter submitted is a question of law, and it does not arise in this case unless the referee and court were mistaken in their conclusion on the subject of duress aforesaid. It is therefore wholly unnecessary for us to examine the arguments made and the authorities cited upon the legal proposition mentioned. The judgment is affirmed.

Affirmed.

THE PEOPLE EX REL. V. JOBS.

Where an office was recognized under the organic act of the territory, and where the same office is recognized under the state constitution, it is a matter of no consequence that the existence thereof under the former instrument was by virtue of certain powers conferred upon justices of the peace, while under the latter its validity depends upon a provision relating to judicial officers for cities and towns.

Error to District Court of Clear Creek County.

UPON petition for rehearing.

Mr. W. T. HUGHES and Mr. L. C. ROCKWELL, for plaintiff in error.

Mr. R. S. MORRISON, for defendant in error.

HELM, J. In view of the authorities cited, a few suggestions seem necessary concerning the "subtle yet important distinction" upon which counsel mainly relies for a rehearing of this cause.

We are asked to say that that portion of the charter of Georgetown which establishes the office of police judge, and prescribes the jurisdiction of the incumbent thereof, is void because in conflict with the state constitution.

The existence of an office similar to that filled by respondent was recognized under the organic act of the territory in *Deitz v. Central*, 1 Col. 323. The name "police judge" was discarded, but the official acts of the individual occupying the position were declared to be valid. Authority so to hold was found in the grant of judicial power by the organic act to justices of the peace. But the court expressly declines to say whether or not the incumbent should assume to be, and act as, such officer.

The constitution superseded the organic act; but in the distribution of judicial powers it clearly provided for this office; even the objection mentioned in *Deitz v. Central* to the name "police judge" no longer exists. *People ex rel. Howell v. Curley*, 5 Col. 412. The powers conferred, and the name or title also, are both within the purview of the later instrument. Sec. 1, art. 6.

Respondent, in this case, was not elected to the office of justice of the peace; he was chosen to fill that of police judge; and his judicial powers were exclusively confined to proceedings under the town ordinances, and a few other matters relating to the corporation. If there

were no constitutional difficulty in the way, he could not act as a justice of the peace until he had complied with certain prerequisites not essential to the office of police judge.

"It *shall be lawful* for the police judge to give bond with such securities as are required by law from justices of the peace in this territory, and, *on filing of this bond*, the police judge shall have the same jurisdiction as is now conferred by law upon other justices of the peace in this territory." Section 5 of an amendment to the charter of Georgetown, adopted in 1874, three years subsequent to the filing of the decision in *Deitz v. Central*, *supra*.

If, therefore, the charter provisions authorizing the election of a police judge, and clothing him with jurisdiction to enforce the ordinances, had been adopted since 1876 as a general law, there would not, in our judgment, be any constitutional objection thereto. But as stated in the principal opinion, this charter is not obnoxious to the constitution on the ground that it is a local or special act.

According to our views, then, the position filled by respondent was a *de jure* office before the constitution, and its legal existence cannot be successfully challenged since the adoption of that instrument. What difference does it make, upon principle, that the existence of this office was sustained, under the organic act, by virtue of the powers thereby conferred upon justices of the peace, while under the constitution we uphold it because authorized by the provision relating to judicial officers for cities and towns? The "substance of the powers conferred" remains the same; names are not controlling; and the office itself is recognized by both of the organic laws.

This case is easily distinguished from that of *State ex rel. v. Maynard*, 14 Ill. 419, to which counsel invites our attention. The differences between the two cases will readily appear upon a cursory reading of that opinion, and we decline to lengthen this one by discussing them. The rehearing is denied.

Rehearing denied.

7	592
9	163
10	601
7	592
19	38
19	304
19	306
7	592
27	71
27	316
15a	218
7	592
28	141
7	592
34	208
7	592
36	16
36	17
36	277
37	68

THE COLORADO CENTRAL RAILROAD COMPANY V. MARTIN.

1. It is a well settled rule, upon the subject of negligence, that when the plaintiff so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover.
2. Cases frequently arise wherein it becomes the duty of the trial court to determine the question of the negligence of the party as a matter of law. But where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury.
3. To warrant the court in instructing the jury that a party was guilty of negligence, the case must be such as to allow no other inference from the evidence.

Appeal from District Court of Arapahoe County.

THE facts are stated in the opinion.

MESSRS. TELLER and ORAHOOD, for appellants.

MESSRS. BROWNE and PUTNAM, for appellee.

BECK, C. J. It appears from the transcript of the record that there have been two trials of this cause in the court below, the first resulting in a verdict for plaintiff of \$7,000, and the second in a verdict of \$2,000. Counsel for the appellee, who was plaintiff below, insist that no error intervened on the second trial, and cite authorities to sustain the rulings and instructions of the district court, but say in the concluding paragraph of their brief: "The verdict of the jury was so small that if the court can grant a new trial without violating any of the known principles of the law governing the case, we will not complain."

The disposition of this court is to sustain the judgments of *nisi prius* courts when it can be done without violating the known and settled principles of the law governing the cases and questions presented for review.

In the present case the judgment can only be sustained

on the theory that the defendant was guilty of negligence in failing to provide proper and safe means of carrying guns upon its trains, for their defense against train robbers, and that the plaintiff was not guilty of such contributory negligence as tended to produce the injury complained of.

One of the well known and well settled principles of the law, upon the subject of negligence, is that, when the plaintiff so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover. The jury was informed of this rule, but it is apparent, upon a review of the evidence, that it was ignored by them in their deliberations.

We are of opinion that the verdict is not supported by the evidence, and also that the court committed two errors upon the trial. The first error was in instructing the jury, as a matter of law arising upon the facts proven, that the defendant was undoubtedly guilty of negligence. The other error was in the refusal to instruct the jury, as prayed by defendant's counsel, "that, under the evidence in this case, in view of the law of the case, the plaintiff is not entitled to recover, and your verdict should be for the defendant."

The effect of the instructions given was to declare the defendant guilty of negligence, as a matter of law, and to leave it for the jury to say whether, under all the facts and circumstances of the case, the plaintiff was guilty of such negligence as contributed to the injuries received by him, or whether he acted as a man of ordinary prudence in remaining in the service of the defendant, in view of the negligence of the latter, after the same became known to the plaintiff. These instructions were certainly misleading when applied to the facts disclosed by the proofs of both parties to the controversy.

The material and uncontradicted facts are, that an.

attack by train robbers had been threatened upon defendant's train on the portion of its railroad extending from Denver, Colorado, to Cheyenne, Wyoming territory, which lies north of Fort Collins in the state of Colorado. Trains had been attacked upon the Union Pacific Railroad shortly before, and the officers of the defendant company, having private information that an attack of its trains was contemplated, deemed it prudent to provide arms and ammunition for their defense, which was done about September 1, 1878.

Prior to that date the train officers carried their own arms.

The arms and ammunition provided by the railroad company were three breach-loading shot-guns, and one hundred cartridges charged with buckshot. These guns were placed by the superintendent of the defendant company in charge of the train baggage-master, there being but one passenger train on the road, which train made the round trip from Denver to Cheyenne and back each day.

The instructions of the superintendent were to keep the guns unloaded and wrapped up in a quilt or blanket which was provided, except when passing over that portion of the road upon which the attack was apprehended. After passing Fort Collins, outward bound, the guns were to be unpacked and charged, ready for use; and after reaching or passing the same point on the return, the cartridges were to be withdrawn and the guns again wrapped up in the blanket. Upon reaching Golden (the headquarters of the company), the package was to be delivered to the station baggage-master, to keep until the return of the train from Denver next morning, when he was to return the package to the train.

Two conductors, the plaintiff and one Davis, ran the train upon this route upon alternate days, each taking command of his train at Golden in the morning, upon its return from Denver.

Both conductors knew of these regulations and had frequently seen them carried out. The work of inserting the cartridges, and of afterwards withdrawing them, was easily and quickly done, and it does not appear that any accident occurred in carrying or handling the guns upon the train.

The injury complained of occurred at Golden on the 26th day of September, 1878. The immediate cause of the accident was the failure of the train baggage-master, on the 25th day of September, 1878, to withdraw the charges from the guns upon the return trip from Cheyenne, and before delivering the package to the station baggage-master at Golden. The plaintiff was in charge of this train, on the latter day, as conductor. As usual, he spent the night in Denver, and after leaving the train next morning, upon reaching Golden, that Conductor Davis might make his regular trip thereon, one of the guns was accidentally discharged while being put on board the train by the station baggage-master, the charge taking effect in the body of the plaintiff and seriously injuring him.

The guns were in the same condition at the time of the accident as when delivered to the station baggage-master the evening previous, all being rolled up in the blanket.

Respecting the duties and authority of the conductors of this train, the testimony is that it is the duty of the conductor to take charge of the train and everything on board from the time it leaves the depot until it arrives at its destination. All tools, and other things carried for the use of the train, all treasure boxes and property, are in charge of the conductor, and all the employees on board are subject to his orders. In case of an attack upon the train, he would be in command of its defense and have control of the arms. These are the affirmative facts disclosed by the evidence which we deem pertinent to the controlling questions presented by the record.

The plaintiff testified that he had received no instruc-

tions concerning the guns, but admitted that the train baggage-master was subject to his orders, and that in case of an attack of his train, he, the plaintiff, would have had charge of the guns and control the defense. He admitted that he had never inquired whether the charges were removed from the guns before being placed in the care of the station baggage-master at Golden, or not, and did not know whether they were being handled at that point in a loaded or unloaded condition. He made no inquiry whether the guns were loaded, or not, on the 25th day of September.

Concerning the duties of the railroad company, the court charged the jury, among other things, as follows: "Under such circumstances, the court charges you that it was the duty undoubtedly of the defendant company either to provide gun racks for the safe storage and carriage of the guns upon the train, so that they would not have to be taken off and put upon the train each day as the train passed and repassed Golden station, or else to have kept some competent and experienced person or persons to take charge of said guns and see to it that they were taken proper care of to guard against any accident, and that it was undoubtedly negligence to leave the putting of said guns upon the train, the putting them off again from the train to the station baggage-master and train baggage-master respectively, as common baggage, in addition to their other numerous duties to be by them performed." * * * "The court instructs you that the company or person that employs dangerous weapons or elements in the management of the business engaged in, must use extraordinary care in their management or use and if you find from the evidence that the defendant, at and before the accident referred to in the pleadings and evidence, was carrying guns on its trains, then it was required by its duty to its employees to use the most approved means for their transportation, so as to save harmless its servants required to use them; and

the court further instructs you, that if you find the defendant did carry those guns as it is alleged, then it was required either to carry said guns in a gun rack, or by placing said guns in the hands of a special agent charged with their custody, or some other manner equally safe."

When it is remembered that the railroad company did not leave to the respective baggage-masters mentioned the duty of putting loaded guns on and off its trains, but that the instructions of Superintendent Henry were to withdraw the charges on passing Fort Collins on the return trip; and when it is further considered that unloaded guns are just as harmless as any other species of baggage, it becomes evident that the above instructions overstated the duty and responsibility of the defendant.

Had the instructions of the superintendent been observed, it would have been as impossible for the accident to have happened, by putting on board the train this package of guns, as if the package had contained umbrellas or walking-sticks instead of guns.

In view of the evidence, it seems clear to our minds that plaintiff, as conductor of the train, was chargeable with the duty of seeing that these or other reasonable precautions were observed by the train baggage-master. If the officers of the defendant company had done nothing but provide the guns and ammunition for the defense of its trains, which is conceded to have been proper under the circumstances, it would have been the duty of the conductors, by virtue of their authority, to have made, and caused to be observed, such rules for the handling and care of these guns, as would have ensured the safety of both passengers and employees, and the safety from theft of the guns themselves. We cannot indorse the proposition that the failure of the defendant to provide one or more special agents of experience, to take charge of three shot-guns, or its failure to provide gun racks upon the train for their storage and safety, constitutes negligence *per se*.

It is not charged in the complaint, nor does any witness testify, that the train baggage-master was not a person of experience in the use of fire-arms, nor does it appear that the plaintiff ever objected to his acting as custodian of the guns. The complaint and replication charge the negligence resulting in the accident upon the station baggage-master at Golden, over whom the plaintiff had no control, and upon the railroad company. The real facts are ignored, to wit: that the negligence which caused the accident occurred on the previous day on board the plaintiff's train, in the failure to withdraw the cartridges before placing the guns in the hands of the station baggage-master. The latter testified that he was not aware they were loaded, and the circumstances of the case show he had reason to believe they were not loaded. Doubtless it would have been a convenience to have had gun racks upon the train. The object of removing the guns into the company's baggage room every evening at Golden, was to prevent them from being stolen, during the night, in Denver. A secure closet upon the train, in which they could have been safely locked up during nights, would have saved much handling of the guns, and had the same been provided, it is probable that the accident complained of would not have occurred. Neither would it have occurred if the superintendent's instructions had been observed on board the plaintiff's train.

Cases frequently arise wherein it becomes the duty of the trial court to determine the question of the negligence of a party as a matter of law, as where the facts clearly show an obvious disregard of duty and safety; where a party has failed in a clear legal duty; where the evidence so clearly shows the want of prudence and discretion that there can be nothing for the jury to pass upon. *Behrens v. K. P. R'y*, 5 Col. 400; *Ernst v. Hudson River R. R. Co.* 35 N. Y. 41-47; *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 122; *The*

Pittsburg & Connelville R. R. Co. v. McClurg, 56 Pa. St. 297.

We are of opinion that the negligence charged against the defendant does not come within the above principles, or within any well settled rule of law which justifies the determination of the question as matter of law. On the contrary, the matter does seem to come within the opposite rule, that where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury. See authorities *supra*; also *Langhoff v. Milwaukee & Prairie du Chien R'y Co.* 19 Wis. 515.

It has been well said, that, to warrant the court in instructing the jury that a party is guilty of negligence, the case must be such as to allow no other inference from the evidence. And if the question depends upon a state of facts from which different minds may honestly draw different conclusions, the question must be submitted to the jury. Wells, Questions of Law and Fact, sec. 265 and authorities cited.

In respect to the negligence of the plaintiff, the admitted facts of the case show that while he had full knowledge of the facts that the guns were in charge of the train baggage-master during each day; that if needed for defense at all it was only upon the northerly portion of the road; of the custom of leaving them at Golden during the night; and although invested by his position as conductor with authority over the train baggage-master, as well as over all other employees upon the train, and with ample power to make and cause to be observed all rules necessary for the safety of passengers, employees and property, he failed to take any precautions whatever, so far as this record shows, to guard against accidents from the handling of the guns. He neither gave orders concerning the care of the arms, nor made inquiries how they were being cared for.

Independent of any orders from the superintendent,

the conductor could and should have commanded the custodian of the guns to withdraw the cartridges upon leaving that portion of the road upon which danger was apprehended. Common prudence dictates that this precaution should have been taken to guard against accident.

There is no force in the suggestion that the baggage-master's numerous duties conflicted with the safe handling of the guns. The withdrawal of the charges was the work of a moment, and there was ample opportunity to perform this duty when baggage was not being handled.

The evidence clearly shows the want of prudence and discretion on the part of the plaintiff, and an obvious disregard of duty and safety.

When the facts are clearly settled, and the course which common prudence dictates can be clearly discerned, the question of negligence is to be decided as matter of law. *Shearman & Redfield on Negligence*, p. 13, sec. 11 and notes.

We must hold, upon the record before us, that it presents the case of an injured party, who, knowing the dangers of his position, failed to exercise that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances. We said, in *Behrens v. K. P. R'y Co.*, *supra*, that a recovery of damages could not be sustained under such circumstances; that the doctrine of all the cases is, that if a plaintiff so circumstanced might have avoided the injury by the exercise of ordinary care, he cannot recover although the defendant was negligent.

If, therefore, it be conceded that the jury might have found the defendant guilty of negligence, had the question been submitted to the jury, it would have become a case of mutual fault or negligence, in which case the law neither casts all the consequences upon the defendant, nor attempts any apportionment thereof. *Cooley on Torts*, 674-78; *C. C. R. R. Co. v. Holmes*, 5 Col. 197.

In this condition or state of the case, it was error for the court to refuse to instruct the jury, as prayed by defendant's counsel, that the plaintiff could not recover. *Railroad Co. v. Jones*, 5 Otto, 439. But aside from this error, the verdict of the jury cannot stand, because it clearly appears that the plaintiff's negligence contributed to the injury, and because the verdict is against the law and the evidence.

The negligence of the train baggage-master in failing to carry out the instructions of the superintendent of the defendant company, was the negligence of a fellow-servant in the course of a common employment, and it not appearing from the testimony that he was an incompetent person to have the care and custody of fire-arms, or that he was inexperienced in their use, but only that he was guilty of negligence in that behalf, the defendant, for this reason, in addition to those above given, could not be held responsible, under the circumstances in this case, for the result of this negligence.

For the errors mentioned the judgment will be reversed and the cause remanded.

Reversed.

DE WALT V. HARTZELL ET AL.

1. Error cannot be maintained upon the refusal of the court to give an instruction not applicable to the case made by the evidence. And under the facts in this case, *held* that the promise upon which action was brought was a promise to pay the liabilities of the promisor, and not such a case as could be brought within the statute of frauds, which was pleaded in bar.
2. Under section 74 of the code, as amended upon the overruling of a demurrer to a complaint during term, the court shall, by order, fix the time to answer.
3. In a petition for change of venue, either in respect to the prejudice of the judge or the inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments.

7	601
14	588
7	601
19	95
7	601
8a	488

Appeal from District Court of Custer County.

THE facts are stated in the opinion.

Mr. J. F. FRUEAUFF, for appellant.

Mr. A. J. RISING, for appellees.

STONE, J. The appellant De Walt, and the appellees, the two Hartzell brothers, were together owners of one-half of the capital stock of a certain mining company. The mine operated by the company was situate near Silver Cliff, in Custer county. Appellant was the treasurer of the said mining company, and was engaged in the banking business at Leadville. The appellees were bankers at Silver Cliff. An arrangement was made between appellant and appellees that for business convenience in paying the expenses of working the mine, the manager of the mining company should draw orders upon appellant payable at Silver Cliff; that appellees should pay such orders at their bank in Silver Cliff, and should then transmit the same to appellant at Leadville, who, as the treasurer of the said company, should remit the amounts of such orders to the appellees.

Suit was brought in the court below by appellees to recover from appellant the sum of \$2,563.84, advanced and paid out, under the arrangement above stated, for labor, tools and other expenses in working the mine. Appellant, in his answer, pleaded, *inter alia*, the statute of frauds, for that the alleged agreement of appellant to repay, as averred, was to pay the debt of another, viz., the said mining company, and was not in writing, signed, etc. To this plea the replication denied that it was the debt of another.

The court refused to instruct the jury, as prayed by appellant, that if they believed that the indebtedness paid by appellees was the indebtedness of the mining company, and not that of appellant, and that the prom-

ise of appellant to pay the same was not in writing, they should find for said appellant, and the refusal to give such instruction is assigned for error.

There was no error in refusing this instruction. It was inapplicable to the case made by the evidence, and calculated to mislead the jury. The indebtedness shown was that of appellant as treasurer of the mining company, and as between him and appellees, who were acting as his agents in making the advances for him, it was the same as his individual indebtedness. The agreement was between mutually interested parties. As treasurer, appellant was liable for the sums he had authorized the manager to draw upon him for and promised to pay. The advances by appellees were made at appellant's request, and for his accommodation. Considering the relation of the parties to the mining company, and to each other, it cannot be said that the promise of appellant was to pay the debt of a third party. It amounted simply to an agreement for the transfer to appellees, by appellant, of certain funds in his hands in settlement of advances therefor by appellees, who stood in the same relation to appellant that the manager did, whom the appellant had authorized to draw upon him for said funds. In short, it was a promise to pay the liabilities of the promisor, and not such a case as can be brought within the statute of frauds, which was pleaded in bar of the agreement.

As there was no error in refusing the instruction in question, there was, for the same reason, no error in overruling the demurrer to the complaint.

Error is also assigned "because the court, in overruling the demurrer to the complaint, allowed but two days in which to file an answer." In support of this assignment, counsel for appellant rely upon section 74 of the code, as amended by the law of 1879 (Session Laws 1879, p. 216), which it is insisted fixes ten days "as the general

time in which all steps in regard to demurrers, answers or replications are to be taken." In answer to this, it is only necessary to say that counsel are mistaken; the provision of the statute cited refers only to demurrers and amended pleadings filed and allowed *in vacation*; while the same section declares that when such proceedings are had "during the term of court, the court shall fix the time by order to expedite the trial."

Another assignment of error is predicated upon the refusal of the court to grant a change of venue on the petition therefor by the appellant.

We think the petition fails to set forth facts sufficiently, either in respect to the alleged prejudice of the judge, or of the inhabitants of the county, to warrant us in interfering with the ruling of the court, under the discretion vested therein by the statute touching applications of this character. Beyond the bare allegation of prejudice, sufficient facts should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments; otherwise a change of the place of trial, with its involved expense and delay, might go as a matter of course upon the mere petition therefor, supported by an indefinite affidavit, as in this case.

The drafts or orders of the manager, drawn upon appellant and paid by appellees, were received in evidence over the objection of appellant; and against like objection, testimony was heard as to what was the arrangement or agreement between appellant and appellees, under which the payments in question were made by appellees; and the ruling of the court in admitting such evidence is assigned for error.

This evidence was pertinent to the issue made by the pleadings; and in accordance with our view, sustaining the validity of the agreement, the evidence in question was competent.

There was no error in overruling the motion for new trial.

Perceiving no error in the record, the judgment will be affirmed.

Affirmed.

THE PEOPLE EX REL. V. OSBORNE.

1. A comparison of section 2 of the statute establishing the State Industrial School with section 6 of article 4 of the constitution, shows that while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate.
2. There being no constitutional restrictions imposed, it is competent for the legislature to provide the manner of making original appointments, the terms of office, how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire.
3. It is a fundamental rule of interpretation that every law is adopted as a whole; and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. The intent and purpose of a law is to be considered in its interpretation.
4. The word vacancy has no technical or peculiar meaning, as used in the statute (Laws 1881, p. 132, sec. 2); it means empty and unoccupied, as applied to an office without an incumbent. An office is not vacant while any person is authorized to act in it, and does so act.

Error to District Court of Jefferson County.

THE facts are stated in the opinion.

Attorney-General D. F. URMY and Messrs. MARKHAM, PATTERSON and THOMAS, for plaintiff in error.

Mr. J. H. BROWN, for defendant in error.

BECK, C. J. The legislature of 1881 passed an act establishing a state institution to be styled the State Indus-

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11	110
7	605
1a	372
7	605
19	194
7	605
10a	179
10a	320
11a	407
7	605
27	236
7	605
30	448

trial School. The second section of the act provides that:

"Sec. 2. The general supervision and government of said industrial school shall be vested in a board of control, who shall be appointed by the governor, by and with the advice and consent of the senate, the members of which board shall hold their offices for the respective terms of two, four and six years from the 1st day of March, A. D. 1881, and until their successors shall be appointed and qualified, and thereafter there shall be one of said board appointed every two years, whose term of office shall continue for six years, or until his successor is appointed and qualified; and whenever any vacancy shall occur in said board by death, resignation or otherwise, the governor shall fill the same by appointment, and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill." Session Laws Col. 1881, p. 132.

The act was approved on the 12th day of February, 1881, and on the next day, the legislature being in session, the governor of the state, by and with the consent of the senate, appointed one A. L. Emeigh a member of the board of control of said industrial school for the term of two years, to hold and occupy said office from the 1st day of March, 1881.

The appointee qualified and performed the duties of the office up to the 13th day of November, 1882, when he resigned, and the defendant in error, Osborne, was appointed by the governor to fill the vacancy. The term of office to which the said Emeigh had been appointed expired on the 1st day of March, 1883, but through oversight, no nomination for a successor to the then incumbent, Osborne, was sent to the senate, which convened in the month of January, 1883; consequently no successor was appointed at that session. After the adjournment of the general assembly, to wit, on the 14th day of June, the governor appointed the relator, C. P.

Butler, a member of said board of control, in place of said Osborne, on the theory that the term of the latter had expired, and that a vacancy existed by reason of the failure of the governor and senate to appoint a successor.

Butler qualified and demanded the office, but Osborne refused to surrender the possession thereof, and the present action is brought to test the question, who is entitled to exercise the functions of said office.

A demurrer was filed to the complaint, alleging that it did not contain facts sufficient to constitute a cause of action. The district court sustained the demurrer and dismissed the complaint.

The pleadings present two principal questions for our consideration, viz.:

1st. Do the provisions of the constitution concerning appointments to office, and appointments to fill vacancies in office, control in the present case, or do the provisions of the statute establishing the industrial school control such appointments?

2d. Did a vacancy exist in the office in question at the time of the appointment of the relator, C. P. Butler?

Section 6 of article IV of the constitution is as follows:

“The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty or malfeasance in office. If, during the recess of the senate, a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of auditor of state, state treasurer, secretary of state, attorney-general or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be

the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law. The senate, in deliberating upon executive nominations, may sit with closed doors, but in acting upon nominations they shall sit with open doors, and the vote shall be taken by ayes and noes, which shall be entered upon the journal."

A comparison of the foregoing provisions of the constitution with those of sec. 2, *supra*, of the statute, shows that while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate.

It is evident, then, that if the offices in question had been created by the constitution, the statutory provisions for the filling of vacancies would be in conflict with the constitutional provisions on the same subject, and, to the extent of the variance, the statute would be void. But these offices were not created by the constitution but by the statute, nor can it be said that the constitution has provided either for original appointments to fill the offices, or for appointments to fill vacancies in said offices, since both events are "*otherwise provided for*" by the statute. This being so, the fundamental principle obtains, that the legislature has unlimited power in regard to legislation, save only as to restrictions imposed by the constitution. *Thorpe v. Rutland & Burlington R. R. Co.* 27 Vt. 140, 142; Cooley's Constitutional Limitations, p. 107.

There being no constitutional restrictions imposed in this instance, it was entirely competent for the legislature to provide, as it has done, the manner of making original appointments, the terms of office, how all vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire.

This view of the subject is in harmony with the rule announced by this court in the case of *People, etc. v. Rucker*, 5 Col. 455.

We proceed now to the second inquiry. Did a vacancy exist in the office in question at the time of the appointment of Butler?

This inquiry involves a construction of sec. 2 of the statute establishing the industrial school.

This section provides that the members of the board of control shall be appointed by the governor, by and with the advice and consent of the senate, during the session of the general assembly, the appointees to hold their offices for the respective terms of *two, four and six* years from the 1st day of March, 1881, "*and until their successors shall be appointed and qualified.*" This provision covered the case of Emeigh, who was appointed for the term of two years.

The following provision covers the case of Osborne, his successor: "Whenever a vacancy shall occur in said board by death, resignation or otherwise, the governor shall fill the same by appointment, and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill."

What is the meaning of the clause, "and the appointee shall hold only for the unexpired term," etc.?

Counsel for the relator say this is a limitation imposed upon incumbents appointed to fill vacancies, restricting them to the unexpired terms simply, thus denying to this class of incumbents the conditional extensions vested in original appointees by the words, "and until their successors shall be elected and qualified."

Counsel for defendant in error say this construction is unwarranted, and argue that Osborne, upon his appointment and qualification, became entitled to hold the office in the same manner and to the same extent of term that his predecessor might have held it, including the conditional extension mentioned.

In our judgment the latter view is the correct one. It is sustained both by the words of the statute, taken in their obvious and ordinary signification and import, and by the evident intention of the framers as collected from the context.

It is a fundamental rule of interpretation that every law is adopted as a whole; and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. Cooley's Const. Lim. p. 70.

The intent and purpose of a law is to be considered in its interpretation, and this intent may be ascertained from the words employed, and by viewing and comparing together the whole and every part of the act. 1 Kent, 462. Viewing the act in the light of these familiar principles, the purpose and meaning of the phrase "*shall hold only for the unexpired term of the person whose place he is appointed to fill,*" is plain and unambiguous.

The terms of the first incumbents were made to consist of different periods, so that one term would expire every two years, dating from the 1st day of March, 1881. All terms thereafter were to be six years. This arrangement made it the duty of the governor, by and with the advice and consent of the senate, to appoint a successor for one member of the board at each session of the General Assembly, said body convening in regular sessions on the first Wednesday in January of each alternate year.

In order to carry out this system of biennial appointments and successions, it was necessary, in the first place, to provide for filling vacancies; and, in the second place, to limit the terms of such appointees to the unexpired terms of their predecessors.

If no provision had been made in the statute for filling vacancies, then the constitutional regulation would have been in force, and such appointees would hold only until the next meeting of the senate. This might operate to nullify the system of appointing one member of the board

at each session of the general assembly, and require the appointment of two members at the same session.

Again, if incumbents appointed to fill vacancies were not limited to unexpired terms, the plan of biennial appointments provided by the statute might be defeated by the issuing of commissions to end at different intervals from those specified in the act. Or, if such appointees were restricted to the balance of a calendar term, it would, as suggested by counsel for defendant in error, afford an opportunity to executives to defeat the will of the legislature by withholding nominations from the senate when in session, thus creating vacancies, which they could afterwards fill without the advice and consent of the senate.

The evident intent of the legislature was to guard against such consequences. The provision extending the term of office until a successor shall be appointed and qualified is usual in constitutional and statutory enactments of this character. The object is to prevent any inconvenience that otherwise might arise from a vacancy in an office occurring after the expiration of a term and before the qualification of a successor.

It is to be presumed that the usual object was sought to be attained in the present instance, and, if this be so, precisely the same reason exists for extending the provision to unexpired terms as to full terms of service.

Viewing the subject in accordance with the principles announced and in the light of the context, the clause, "and the appointee shall hold only for the unexpired term of the person whose place he is appointed to fill," means simply that an officer appointed to fill a vacancy shall not hold for a full term, but shall retain the office for the same time that his predecessor might have retained it, and no longer.

This view harmonizes the tenure of office with the system of appointments provided by the statute, and renders the whole consistent and effectual.

It follows that Osborne, upon his appointment and qualification as the successor of Emeigh, succeeded to all the duties, rights and privileges of his predecessor, and thereafter bore the same relation to the office as did his predecessor.

What, then, is the import of the term *vacancy*, employed in the statute? The supreme court of Indiana has said that this word has no technical or peculiar meaning as used in the statute of that state; that it means empty and unoccupied, as applied to an office without an incumbent. *Stocking v. The State*, 7 Ind. 326.

We entertain the same opinion respecting the legal signification of the term as it is used in our statute. Section 2 of the act of 1881 only authorizes an appointment by the governor, *without* the consent of the senate, when necessary to fill a vacancy in the board of control arising from *resignation, death*, or otherwise. Whatever the contingency may be, it must occasion a *vacancy* in the office, or the power of appointment by the governor alone does not exist.

It was decided in *Tappan v. Gray*, 9 Paige, 506, that an office is not vacant while any person is authorized to act in it, and does so act.

In the case of *The People ex rel. Parkinson v. Bissell*, 49 Cal. 407, the statute provided that appointments to the office of inspector of gas meters should be made by the governor, with the consent of the senate, except when made to fill vacancies, and that incumbents in office should continue to discharge the duties thereof until their successors were qualified. Upon the theory that Bissell's term of office had expired, the governor, during the recess of the senate, appointed Parkinson to fill the vacancy, although Bissell still continued to discharge the duties thereof. The latter refused to surrender the office, and an information setting out the facts was filed in behalf of Parkinson, charging that Bissell was an usurper and intruder into the office of "inspector

of gas meters." The court held, upon demurrer to the information, that if Bissell's term of office had in fact expired, so long as he continued to discharge the duties there was no vacancy in any sense which would authorize the governor to fill the office without the consent of the senate.

To the same effect is the case of *The State ex rel. Clifford v. McMullen*, 46 Ind. 307, where the auditor of a county, who was authorized by statute to fill vacancies in the office of township trustee, determined that a vacancy existed in that office, by reason of the failure to elect a successor at the general election (the two candidates therefor getting each the same number of votes), and appointed a successor. The incumbent being authorized by statute to hold the office until his successor should be elected and qualified, refused to deliver up the books and papers, and continued to perform the duties of the office. The court held there was no vacancy, and that the appointment of the auditor was a nullity.

It is clear to our minds, from the language of the statute, that no vacancy existed in the office of member of the board of control of the State Industrial School at the time of the appointment of the relator, and this conviction is confirmed by the reasons assigned and the authorities cited.

It is unnecessary to discuss the remaining proposition of the relator, that his appointment may be justified under the power of removal vested in the governor. No such fact is alleged in the information, and it cannot be supplied on demurrer charging that the complaint does not state facts sufficient to constitute a cause of action. The judgment is affirmed.

Affirmed.

STREPEY ET AL. V. STARK ET AL.

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16	808
7	614
23	16
7	614
25	294
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15a	147
7	614
28	181
7	614
23	348

1. The objects and functions of an "additional" location certificate are peculiar; it differs from ordinary documentary muniments of title in that it is not a title, nor proof of title; nor does it constitute, or of itself establish, the possessory right in issue, and to which it relates. It is, when recorded, notice to the world of the facts required by statute to be therein set forth, and it is also one of the steps requisite, under the statute, to constitute a mining location.
2. Four certain things are to be done in order to perfect a mining location: First, the sinking of a discovery shaft; second, the posting of a discovery notice; third, the marking of the surface boundaries of the claim; fourth, making and recording a location certificate.
3. Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. And such certificate, when recorded, is competent evidence to show the date of location, the description of the premises, and that the statute requiring such certificate to be made out and recorded has been complied with.
4. The admissibility of an "additional" location certificate is not affected by the circumstance that it was filed subsequent to the commencement of the suit. It is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the adverse party.
5. The rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary, is *held* not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but where the prior possession of the plaintiff is pitted against the present possession of the defendant.
6. Under location statutes, to constitute such possession as will give the locator a right to mineral lands before patent issues, neither residence on the premises, nor continuous actual occupation, nor that kind of possession denominated *possessio pedis*, is required.

Appeal from District Court of Chaffee County.

THE facts are stated in the opinion.

MESSRS. HARTENSTEIN and SINDGLER, for appellants.

MESSRS. RHETT and HOBSON, for appellees.

STONE, J. This is a contest between two sets of claimants for the possession of a certain mining claim, which appellees claim as the "Little Belle" lode and appellants as the "Negro" lode. Appellees, the plaintiffs below, alleged right of possession by virtue of discovery, prior possession, location, and compliance with the mining laws relating thereto. Appellants, as defendants, merely denied in their answer the several allegations of the plaintiffs' complaint.

The ground of defense upon the trial was, chiefly, that appellees had failed to comply with the law in not doing sufficient work on the claim, previous to appellants' possession, to entitle them to hold it. Appellees established their discovery of mineral on the ground as original locators in June, 1879, and their witnesses testified that a discovery shaft was sunk that year to a depth of over ten feet; that a location was made in accordance with law in July, and a certificate thereof filed in September of that year. That when they went to resume work on the mine the next year, appellants were in possession. The testimony of appellants was that they first came upon the ground in June, 1880, and found a small cut or excavation, not more than four or five feet deep, exposing a little mineral, and that the only stake they found was an old one at this excavation, containing the name of one of the appellees and the date 1875; that they went to work in the same excavation and sunk to the depth of about fifteen feet; took out mineral, and located the claim by the name of the Negro lode, and filed location certificate in August following. The ground claimed by each side is shown to be practically, if not identically, the same, and the appellants seem to have claimed and located, or rather relocated, the mine, and asserted right thereto, on the ground that the discoverers and former occupants had failed to comply with the law in respect to the necessary work and staking, and had therefore

either abandoned the claim or forfeited their right thereto, if they ever had acquired any right at all.

The verdict and judgment below were in favor of the plaintiffs, upon the third trial of the case, and appellants seek to have the judgment reversed because the verdict, as they allege, is contrary to the weight of evidence; that improper evidence was admitted on the trial; that proper instructions prayed were erroneously refused by the court, and that the jury were improperly influenced by remarks made by the judge, pending their deliberations, for the purpose of inducing them to agree upon a verdict.

Upon the matter of the admission of evidence which is assigned for error, the principal objection, as argued by counsel for appellants, appears to be made to the admission of appellees' amended certificate of location.

Both parties had made and recorded amended location certificates. The original location certificate of appellees was filed for record September 20, 1879, and their amended certificate on June 16, 1881.

The original certificate of appellants was filed August 30, 1880, and their amended certificate September 26, 1881.

The original and amended certificates of appellees were offered in evidence together, and, over the objection of appellants, were admitted, with the following remarks, in the nature of instructions by the court to the jury, to wit:

"Upon a proper identification of certificates they will be admitted in evidence, and the jury will be instructed that the first certificate is in itself void, and it confers upon the plaintiffs no title; that if they find from the evidence that before the amended certificate was filed for record, defendants acquired rights in the premises, or an interest in the premises, then they shall disregard the second certificate; but if they find that defendants acquired no such interest, then the second certificate will

relate back, under the law, to the plaintiffs' (location), and will confer upon plaintiffs the rights which would have been acquired had the first been a proper location certificate."

Before the close of the evidence on behalf of appellees, the court ordered their original location certificate withdrawn, giving the reason therefor in the following words, to wit: "On a little reflection, I state this before plaintiffs close their case: I have concluded that the amended location certificate performs all the offices that the original could, and therefore I am going to withdraw it from the jury, and leave the amended certificate before the jury, with a proper instruction."

The original location certificate of appellants was also held void and excluded, while their amended certificate was admitted in evidence.

The objection made by appellants to the admission in evidence of appellees' amended location certificate is put upon the ground that this certificate was not filed for record until after the commencement of the suit; and in support of this objection counsel invoke the rule that a plaintiff in ejectment must stand or fall on the right he had when he commenced his action, and cannot make or strengthen his case by any after-acquired right or title. The question here raised is one of importance in this class of cases, and one that, so far as we can ascertain, has not before been passed upon by the court of last resort, so that we are left to determine it without the aid of adjudged precedent; but we think the rule contended for by appellants' counsel, as above stated, is inapplicable to a case like this.

The question rests chiefly, if not solely, upon what we are to consider as the nature, purpose and functions of such location certificate. Its object and functions are peculiar; it differs from ordinary documentary muniments of title in that it is not a title nor proof of title, nor does it constitute, or of itself establish, the possess-

ory right in issue, and to which it relates. It is purely a creature of the statute, and, under the evident legislative intent, its purpose and functions are twofold. When duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground; and is thus constructive notice of the claimant's possession. In addition to this purpose which it is to serve, it would seem that, by statute, such certificate is made one of the steps requisite to constitute a perfected mining location.

Under the law, four certain things are to be done in order to perfect a location: *First*, the sinking of a discovery shaft upon the lode ten feet in depth, or deeper if necessary to disclose mineral in place; *second*, the posting of a notice at the place of discovery, giving the name of the lode, the name of the locator, and the date of discovery; *third*, marking the surface boundaries of the claim by posts, in the manner pointed out by statute; and *fourth*, making and recording a location certificate containing the name and description of the lode, the name of the locator, and the date of location. It will be noted that the statute does not require that the certificate shall contain a statement that the discovery shaft has been sunk the requisite depth, or so as to disclose mineral, nor that the discovery notice has been posted, or boundary stakes set, which things are made the chief requirements on the part of a locator in order "to locate his claim," before filing the location certificate, although it is usual to include such statement in the certificate, when the performance of such work, posting and staking, is a pre-existing fact; and it has been held by the United States circuit court of Colorado, that though the locator of a mining claim may not have sunk his shaft to the discovery of mineral in place prior to filing his location certificate, yet if he shall thereafter so sink the shaft and

disclose the lode, he will hold as against all who had not theretofore acquired an interest in the lode, the same as if he had uncovered it before the survey and filing the certificate, such discovery relating back to the location *Zollars & H. C. C. M. Co. v. Evans*, 2 McCrary, 39.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate; the record of the certificate being proof itself of its own performance as one of such steps, and in regular order the last step, in perfecting the location. And the certificate, when recorded, is certainly competent evidence, *prima facie*, of all which the statute requires such certificate to contain, and which are therein sufficiently set forth. And even when the certificate, for any of the reasons set forth in the statute, is deemed "void," it has been held admissible, in connection with a valid amended certificate correcting the defects of the original. *Van Zandt v. Argentine M. Co.* 2 McCrary, 159.

In support of this holding two principal reasons may be mentioned: *First*, the original certificate showing the date of location and record, although fatally defective in matter of description or otherwise, may well be considered as an element tending to show good faith on the part of the locator in attempting to comply with the law in making his location; *second*, the introduction of such original together with the amended, or, as it is termed in the statute, "additional" certificate, may offer a means of comparison in respect to description and surface boundary of the premises located, whether the first is identical with that described in the additional certificate, or whether it embraces the precise ground of any portion thereof claimed by either of the contesting parties otherwise than according to such original location.

The section of the statute under which the right to

file an amended or additional location certificate is given is as follows:

"If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act. *Provided*, that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location."

The purpose of this additional certificate appears to be sufficiently expressed by the language of the act. It cannot create a right of possession or location in the premises claimed under the first location, which did not exist prior to the filing of such additional certificate; it can confer no additional right, and is therefore evidence of none, as against any intervening or pre-existing right of another. It follows that, except as against such intervening rights, an additional certificate serves the same purpose, in its admission as evidence, as that of an original location certificate, and will relate back to the first location.

The evident intent of the statute is that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position that he would have occupied if no such defect had occurred. Such intent is in accord with the principle of all curative provisions of

law. Without such result, this provision of the statute would be ineffectual to confer any additional or other benefit than the provisions of section 2411 (General Statutes), for an entire relocation of a mine, as for an abandoned claim.

From the foregoing view of the purpose and functions of a location certificate, original and additional, it does not appear that the admissibility as evidence of such additional certificate, is affected by the circumstance that it was filed subsequent to the commencement of the suit, since it is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the controverting party.

Counsel for appellants argue that it is illogical and erroneous to hold that the amended certificate can relate back to the original, if the original be void; for if void, it is dead, and the same as if it had never existed; but we are not so holding. What we say is, not that the second certificate relates to the first in the sense in which the term relation is employed to express a well known legal doctrine, but that it relates back to a right of location accruing by virtue of the prerequisite acts of discovery, prior possession, excavation, posting, marking boundaries, and an attempted compliance with the law respecting the filing of a location certificate.

It is further to be observed that the rule in ejectment, that the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of that of his adversary, is held not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but when the prior possession of plaintiff is pitted against the present possession of the defendant. "Practically, the real question involved in all such cases is: Which, as against the other, has the

better right to mine the land in question?" *Richardson v. McNulty et al.* 24 Cal. 339.

Each party must prove his claim to the premises in dispute, and the better right must prevail. *Lebanon M. Co. v. Con. Rep. M. Co.* 6 Col. 371; *Golden Fleece Co. v. Cable Co.* 12 Nevada, 312.

The right to mineral lands, before a patent issues from the government, rests in possession of the claimant. To constitute such possession as will give this right, under location statutes, neither residence on the premises, nor continuous actual occupation, nor that kind of possession for which appellants' counsel contend, denominated *possessio pedis*, is required. *English v. Johnson*, 17 Cal. 108.

The right of possession is the sole issue in the case at bar.

The appellees established their prior right by proof of discovery, prior possession, sinking a discovery shaft, disclosing mineral in place, posting the proper notice, marking the boundaries, and attempting to complete the location by filing a location certificate. These acts were all done the year previous to the appellants' taking possession of the same premises, and attempting its relocation under another name. The original location certificate of appellees was recorded September 20, 1879, and their amended certificate June 16, 1881. The original certificate of appellants was recorded August 30, 1880, and their amended one September 26, 1881. It will thus be seen that the appellees were prior in possession, and that their two location certificates were respectively prior to those of appellants. The original certificate of each party was held fatally defective, and the amended certificates of both parties were recorded subsequent to the commencement of the action.

There was no error in receiving in evidence the original location certificate of appellees. If there was error

in afterwards withdrawing it, of this the appellants cannot complain, since the only possible effect of such withdrawal was to the advantage of the complaining party and the prejudice of the other side.

The error of the court, if in this case it was such, in rejecting the original certificate of appellants, was also without prejudice, for the reason that appellees, by proof of prior possession and location, having established their right of possession at the time of appellants' entry, such subsequent entry and relocation by appellants, in the absence of abandonment, forfeiture, or otherwise intervening loss of right by appellees, conferred upon appellants no right as against appellees, and so their location certificates, being both subsequent, respectively, in time to the corresponding ones of appellees, related to no superior right, and hence, while admissible in evidence, counted for nothing in appellants' favor.

The appellees' priority of possession and seniority of location certificates are undisputed; the issue was the right of possession; under this issue, the appellants, who, by their answer, simply denied this right in the appellees, contested the same on the ground of an alleged want of compliance with the law on the part of appellees in the amount of work done in sinking the discovery shaft, posting discovery notice, and in the necessary marking of the surface boundaries of the claim. If, then, the appellees established, by the testimony, their compliance with law in respect to these points in dispute, their prior right of location and superior right of possession thereby followed, and so continued to exist unimpaired down to the time of trial in this case. It is, therefore, clear that neither the original nor amended certificate of appellants could avail for any purpose as evidence, unless the appellants first established a superior right of location; for, as we have before stated, a location certificate can confer no right of location of itself, and

can relate only to a right of location acquired previous to its filing.

We are not now contending against the admissibility of these certificates as evidence; we concede that the original, in connection with the amended one, might properly have gone to the jury; that, in certain cases, error might be well assigned upon the exclusion of such certificate; but we are here giving reasons for our holding that, if there was possible error in the rejection of the original certificate in this instance, it was error without prejudice to the party complaining, and, therefore, no sufficient cause for reversal.

The instructions given by the court correctly stated the law applicable to the facts in controversy, and covered all the points in issue in the case. There was, therefore, no error in not giving the instructions prayed by appellants, and which were refused by the court.

The testimony as to the amount of work done by appellees on the mine, previous to the relocation by appellants, is conflicting between the witnesses on the one side and those upon the other; but as the jury were the sole judges of the credibility of the witnesses and the weight of testimony, we cannot say that the verdict was contrary to the weight of such testimony, and, under the frequent decisions of this court, there is no cause for reversal on this ground. The jury were warranted in finding upon the testimony, as they evidently did, that the right of possession was in appellees, by reason of discovery, priority of possession, and a prior location, such as to give them the better right to the premises in controversy.

The remarks of the district judge to the jury, when they were called in before the court, after being out for some time pending their deliberations upon their verdict, were, we think, not calculated to produce a hasty, indeliberate or unfairly considered verdict. These re-

marks were of considerable length, and we do not consider it necessary to quote them in full, but, in substance, they reminded the jury of the disastrous effects to litigants and to the public of failures, on the part of juries, to agree upon verdicts at the end of protracted litigation; that this was the third trial of the case in hand, and that the efforts of the court would be to secure a verdict in this instance, if within the bounds of possibility. To prevent any possible undue influence or misconception of the object of these remarks, the court added in conclusion:

“These remarks, gentlemen, are not made for the purpose of influencing your judgment or biasing your minds. They are not made for the purpose of coercing you or influencing you, except so far as they impress on your minds the importance of making every honest and conscientious endeavor possible to arrive at a verdict, and you are not to pay any attention to them save as they may serve that purpose.

“I don’t suppose there is a single man upon the jury who is acting in any other than a conscientious manner. I don’t think there is a man among you who would do so under the oath you have taken; but it is possible that further consideration of the evidence, and further discussion, may lead you to arrive at a conscientious agreement. This is all I have to say. I am going to ask you to retire with the bailiff and further consider of your verdict.”

While a judge is not warranted in saying anything to the jury to influence their decision or indicate to them what their verdict should be (except upon the hypotheses laid down in the written instructions submitted), or even to unduly hasten a verdict, we can see nothing in the remarks made to the jury here that could have operated viciously; and one must presume that the judge had some good reason for addressing them as he did, to im-

press the importance of arriving at an agreement upon a verdict if possible, upon the third trial of the case.

The other assignments of error arising upon the evidence do not appear to be well taken, and are not of sufficient importance to call for discussion.

The judgment will be affirmed.

Affirmed.

INDEX.

ABANDONMENT:

1. A failure to use water is competent evidence of an abandonment of the right thereto; and if continued for an unreasonable period, it creates a presumption of an intention to abandon; but this presumption is not conclusive and may be overcome by other satisfactory proofs. *Sieber et al. v. Frink et al.*, 148.
2. To acquire a right to water from the date of diversion one must, within a reasonable time, employ the same in the business for which it was taken. *Ib.*

ACCOUNT:

1. The rule of law is that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account, without any appropriation, the rule is that it should be applied to the first items in the account. *Mackey v. Fullerton et al.*, 558.

ACKNOWLEDGMENT: See QUO WARRANTO, 6.

ACTIONS:

1. The code abolishes forms of action merely, and provides a single method of pleading. It does not undertake to do away with the distinction between legal and equitable causes of action. It is still the general rule that equitable relief cannot be secured unless an equitable cause of action or defense appear in the pleadings. *Exchange Bank v. Ford*, 814.

ADMINISTRATOR:

1. The preponderance of American decisions tends to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may be advantageous to the estate, and such advantage is the main thing to be considered. *Dusing v. Nelson*, 184.
2. When it becomes necessary to save the estate from loss, it is right, and even obligatory, for the executor or administrator to purchase or take possession of land at the foreclosure of a mortgage belonging to the estate, and to hold the title for the benefit of the estate. *Ib.*

ADVERSE CLAIMANTS: See EQUITY, 4.

AGENTS:

1. The power of a general agent cannot be restricted by secret instructions of his principal, so as to affect a party dealing with such agent, without notice of the covert instructions. *Saxonia M. & R. Co. v. Cook*, 569.
See EQUITY.

AGREEMENT: See CONTRACT.

ANNUAL EXPENDITURES: See MINING CLAIMS, 2.

APPEAL:

1. No appeal lies from an order vacating a judgment. Courts have power over the orders and judgments during the term, and an order made setting aside a judgment rendered during the term, however erroneous, vacates the judgment, and is not subject to review. A subsequent order of the court setting aside the order vacating the judgment does not have the effect to revive or reinstate the judgment. *Owen v. Going et al.*, 85.

2. Where, by the subject-matter of a cross-bill, a contest directly involving title to mines is instituted, the bill alleging that the deed thereto, executed and deposited in escrow by one party, was surreptitiously obtained by the other; that the conditions of sale had not been complied with, and by reason thereof no title had passed; praying affirmative relief, and that the deed be surrendered up to be canceled, and the decree denied the relief prayed for,—*held*, that the decree related to a freehold, and was reviewable on appeal. *Atkinson et al. v. Tabor et al.*, 196.

3. Matters may occur subsequent to judgment which operate to waive the right to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in error. *Ib.*

4. Upon appeal from a judgment of a justice of the peace the cause stands in the county court for trial *de novo*. *Bassett v. Inman*, 270.

5. Where the plaintiff failed to present in the court below the fact that a part of the debt in suit was the purchase price for the property attached, as against the statutory exemption claimed, he cannot raise it for the first time in this court. *Ib.*

6. In an action of forcible entry and detainer, under the statutes of this state, an appeal does not lie from a judgment of a county court to this court. *Brandenburg v. Reithman*, 823.

7. It is doubtful whether the correctness of the ruling of a county court, in denying an appeal to this court in such a case, can be presented on a writ of error to the original judgment. *Ib.*

8. No appeal lies from a judgment imposing a penalty for contempt of court. *Teller v. The People*, 451.

9. A fund in litigation deposited in a bank which is deemed unsafe; an appeal pending from a judgment disposing of same; a person having a contingent interest in the fund, in common with appellants, withdraws a portion thereof from the bank, with the sole purpose of saving it, in view of the failing condition of bank—the appellee having refused to consent to a change of the place of deposit: *Held*, that the withdrawal is not such an appropriation of the fund in litigation as amounts to a waiver of the right to prosecute the appeal. *Atkinson et al. v. Tabor et al.*, 451.

See COUNTY COURTS.

APPLICATION OF PAYMENTS:

1. The rule of law is that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account, without any appropriation, the rule is that it should be applied to the first items in the account. *Mackey v. Fullerton et al.*, 556.

ARBITRATORS.

1. The well-settled rule of law relating to all irregularities in the proceedings of arbitrators, which are not jurisdictional, is that an objection, to be availing, must be seasonably made. If a party, knowing of an irregularity, in order to avail himself of all chances of an award in his favor, remains silent, and permits the investigation to proceed, and money to be expended, etc., he will not afterwards be heard to question the validity of an unfavorable award, on the ground of such irregularity. *The Glass-Pendery C. M. Co. v. Meyer M. Co.*, 51.

2. The failure of one of a board of arbitrators to attend a meeting, when no final action was taken, was a mere irregularity, and not jurisdictional, it appearing that all the arbitrators were present at the last meeting, and all, with the whole evidence before them, consulted and deliberated together concerning their award. *Ib.*

ASSESSMENTS:

1. A valid assessment cannot be made under an invalid ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions. *Brown v. The City of Denver*, 305.

2. Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. *Ib.*

ASSIGNEE:

1. The fact that an assignee of an insolvent firm is an attorney at law does not disqualify him from acting as such assignee. *Tucker v. Parks*, 62.

2. The assignee of a note and account sued upon must be deemed "the real party in interest," under the code, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee. *Bassett v. Inman*, 270.

ASSIGNMENT:

1. The surviving partner of an insolvent firm may make an equitable and just assignment of the partnership effects for the equal benefit of all the firm creditors; but, in his position as trustee, he is not permitted to make an assignment and give preference therein to certain creditors. *Salsbury v. Ellison*, 187.

ATTACHMENT:

1. In an action of attachment under the statute, if the district court has complied with the terms of the statute in respect to obtaining jurisdiction of the person and the subject-matter and in pronouncing its judgment, no authority exists for disregarding or refusing to give effect to such judgment in a collateral proceeding. *Brown et al. v. Tucker*, 30.

2. The levy of a writ of attachment issuing out of a district court being followed by judgment, and execution having issued within a reasonable time, *held*, that the plaintiff's lien upon the attached property was preserved as against a special execution issuing out of a county court on a junior judgment in favor of another party; also *held*, that an objection that a general, instead of a special, execution was issued against the attached property would be unavailing. *Ib.*

ATTACHMENT — *Continued.*

3. Proceeding by attachment is in the nature of a proceeding *in rem*, and the attaching creditor acquires a specific lien upon the property attached. This lien cannot be destroyed, except by dissolution of the attachment or some default of the attaching creditor. *Emery v. Yount*, 107.

4. Such lien is not merged in the judgment rendered in the action, in aid of which the attachment was sued out, until the transcript of the judgment docket has been filed for record in the office of the recorder, since no judgment lien exists until that is done. *Ib.*

5. In case of such attachment lien, where conveyance was made subsequent thereto, an averment of insolvency is not necessary in suit to cancel the conveyance; for though the debtor may be abundantly able to satisfy the judgment, he will not be permitted by fraudulent conveyance to defeat or destroy the specific attachment lien of the creditor. The latter may invoke the aid of equity to remove the obstruction from the way of the enforcement of his lien, without resorting to an execution or other legal remedy. *Ib.*

6. Where, by contract, one is employed by another to do work by the day or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. Such services are comprehended within the meaning of the statute, and after demand for the amount due the laborer may maintain attachment. *De Lappe v. Sullivan*, 182.

7. Though no fees are fixed by the statute for the care of property held by a sheriff under attachment, yet the rule is now settled that the officer is entitled to reimbursement for such reasonable charges therefor as may be allowed as costs by the court or judge. *The City Bank of Leadville v. Tucker*, 220.

8. In such case the plaintiff who sues out the attachment and causes the levy is liable, if his suit be dismissed, to the sheriff for such sum as may be so allowed, and it is proper to tax these charges as part of the costs in the case. *Ib.*

9. In such case, if the amount taxed is excessive, the plaintiff, by motion to retax, has a remedy for the enforcement of his rights, as complete as if the sheriff were required to bring an action for such expenditures, the reasonableness of which he might contest by answer. *Ib.*

10. There is no prescribed form for making a claim of exemption of property from levy under attachment. *Bassett v. Inman*, 270.

11. A traverse of the affidavit in attachment does not waive the right to claim the property attached as exempt. *Ib.*

12. The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred. *Simmons v. California Powder Co.*, 285.

13. Under this rule, held that, by the fourteenth subdivision of section 1 of the attachment act of 1881, the legislature intended to define a separate and additional ground of attachment. *Ib.*

14. A liberal construction must be given to the provisions of the Civil Code, to the end that the legislative intent may be made effectual. Under section 116, the proceeds of attached property may be prorated between the creditors therein specified — the words "returned to the same term of the court to which they are returnable," being interpreted to mean and apply to all writs of attachment which are in fact returned to at or during the same term of the court, at or during which they may be properly returned, after service according to law. *Daniels et al. v. Lewis et al.*, 430.

ATTACHMENT — *Continued.*

15. An affidavit in attachment, stating as ground therefor "that the demand is due on express contract for the direct payment of money, to wit, upon three several promissory notes now overdue," and giving the amount, held a good ground of attachment under the fourteenth subdivision of the attachment act. *Herfort v. Cramer*, 488.

ATTORNEY:

1. When an attorney takes a case upon a contingent fee, and on his own account employs an attorney to assist him in the case, upon promise of a "good fee" for the services he shall render, it is error, upon the trial of an action for such service, to admit testimony showing the amount realized by the attorney whose compensation rested on the contingency. *Wells et al. v. Adams*, 28.

2. The value of an attorney's services in a given case is to some extent governed by the amount in controversy, and the consequent responsibility resting on him, and it is not error to admit evidence of the value of the property in controversy. *Ib.*

3. It is error to allow an answer to a hypothetical question which does not conform to the facts in evidence. *Ib.*

4. The fact that an assignee of an insolvent firm is an attorney at law does not disqualify him from acting as such assignee. *Tucker v. Parks*, 62.

5. For an attorney to stop a judge of a court on the street, and use abusive language to him concerning any judicial action in a case pending before such judge, is such misconduct in office as will warrant the striking of his name from the roll of attorneys. *The People ex rel. v. Green*, 237.

6. In such case it is not necessary that the indignity or insult to the judge should occur in open court, nor that it constitutes a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor. *Ib.*

7. Proceedings for contempt may be termed a police regulation or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it, while proceedings for the disbarment of an attorney are intended to protect generally the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those intrusted with their legal business. *Ib.*, 244.

8. The power to act in connection with contempt is lodged with the court before or against whom the offense is committed. Authority for proceeding in disbarment is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession. The former is punished by fine or imprisonment, and may be largely *ex parte*. The sole penalty in connection with the latter is a prohibition from practicing in the courts of record, and this judgment can only be entered upon notice of charges preferred, and opportunity for defense. A contempt may constitute a ground for disbarment; but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt. *Ib.*

9. If a judge and attorney meet outside the court room and engage in an altercation about some matter in no way connected with judicial action, they are, and ought to be, upon precisely the same footing, in all respects, as other private citizens; when the attorney, by wilful misconduct toward a judge, on account of judicial acts, interferes with or impedes the dignified and proper administration of the law, or is guilty of conduct which tends to do so, whether

ATTORNEY — Continued.

in the court room or on the street, he is guilty of official misconduct. *Ib.*

10. An applicant for license as an attorney should submit to an examination as to his qualifications to the committee for that purpose in the judicial district in which he resides. Being rejected by that committee, it is irregular for him to apply for examination to the committee in another district. An examination by a single member of the committee, though certificate of qualification be signed by two, is insufficient. A license granted under such circumstances will be revoked. *People ex rel. v. Betts*, 453.

BANKING CORPORATION:

1. Where a banking corporation, under the statute, fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture. *The People ex rel. v. City Bank*, 226.

BANKRUPTCY:

1. The court in bankruptcy may, under the statute, upon application of the bankrupt, restrain proceedings of a creditor in the state court, upon a provable claim, where there has been no unreasonable delay by the bankrupt in procuring his discharge. But if the bankrupt neglects to invoke the aid of the bankruptcy court in that way, no valid objection exists to the state court adjudicating the question when properly presented therein. *Brooks v. Bates et al.*, 576.

BONDS:

1. Under the code (section 141, Code of 1893) suit may be brought upon an injunction bond in the first instance against the principal and sureties, and the damages assessed and awarded in such action. *Docket et al. v. Price et al.*, 84.

See **TITLE BOND**.

BRIDGES: See MUNICIPAL CORPORATIONS.**BROKER:**

1. Where a broker, employed to sell real estate within "a short time," found a purchaser to take at the price fixed by the vendor, the vendee paying down a small sum to bind the bargain, and no notice being given the broker of withdrawal or change of terms, held, that two weeks was reasonable time within which to find a purchaser, and that a rise in value was no defense against the broker, seeking to recover commissions. *Smith v. Fairchild et al.*, 510.

CERTIFICATES:

1. In this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority. *People ex rel. v. Cheesman et al.*, 376.

2. The failure of the notary public before whom articles of incorporation are acknowledged, to certify that the parties acknowledging the same are personally known to him, is not fatal. A certificate that the persons whose names are signed to the articles (giving them) appeared before the notary and acknowledged the

CERTIFICATES — *Continued.*

same, is sufficient. Neither the provisions of the statute as to the acknowledgment of deeds, nor the reasons therefor, apply to the acknowledgment of articles of incorporation. *Ib.*

See LOCATION CERTIFICATE.

CERTIORARI:

1. In Colorado there are two different proceedings by *certiorari*: One to review the action of an inferior tribunal, board or officer; the other to secure the trial *de novo* of causes previously heard by justices of the peace. *Small et al. v. Bischelberger*, 564.

2. Where the plaintiff, in action pending before a justice of the peace, agrees, for a valuable consideration, to dismiss the action, and the defendant performs his part of the contract, but the plaintiff, in violation thereof, proceeds to judgment without defendant's knowledge, and purposely withholds execution and levy until the time for appeal has expired, the defendant may have his remedy by *certiorari*. *Ib.*

3. Upon motion to quash the writ of *certiorari* the averments thereof are admitted as in case of demurrer. *Ib.*

4. Under the statute, no issue can be made or tried as to the truthfulness of those averments in the petition which give the court jurisdiction, through the proceeding by *certiorari*, to try the cause *de novo*; the respondent's rights seem, in this particular, to be protected by the bond required of the petitioner, and the liability of the latter to prosecution for perjury if these averments are knowingly false. *Ib.*

CHATTEL MORTGAGE:

1. In the absence of proof of actual notice, a mortgagee under a chattel mortgage, with insufficient description, and not recorded in the county in which the personal property is found in the possession of the mortgagor, may not defeat the rights of a purchaser thereof at judicial sale. *Tabor v. Sampson*, 426.

2. The failure to record a chattel mortgage is fatal to its validity while the property remains in the hands of the mortgagor. An exception is recognized by the authorities where the possession in fact is in the mortgagee, but the mortgagor, *bona fide* and as agent for the mortgagee, continues to sell and appropriate the proceeds to the payment of the mortgage debt. *Wilcox et al. v. Jackson*, 521.

3. Where it was shown that new goods were purchased and mixed with the original stock from time to time after the giving of the mortgage, and no testimony establishing the identity of any portion of the goods seized by an attaching creditor, as the same goods mentioned in the mortgage, and the mortgage making no provision for goods to be afterward acquired, *held*, fatal to recovery under the mortgage. *Ib.*

4. Under the statute of frauds, as interpreted by this court, the vendee of chattels must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller to the purchaser. *Ib.*

CHARTERS:

1. It was no doubt the intention of the framers of the constitution that cities and towns, organized after its adoption, should be organized under general and not special laws. Section 13, article XIV.

CHARTERS — Continued.

But that it was not intended to interfere with the city of Denver, and other cities and towns acting under special charters previously granted by the territorial legislature, is apparent from section 14 of article XIV. *Brown v. The City of Denver*, 305.

2. A special charter granted to a municipal corporation before the adoption of the constitution is not abrogated by that instrument unless in conflict therewith. *The People ex rel. Mills v. Jobs*, 475.

3. The office of police judge, with jurisdiction to enforce town ordinances, is authorized by section 1, article VI, of the constitution. *Ib.*

4. The unconstitutionality of one part of a statute does not necessarily render the whole of the statute void. *Ib.*

CITIES AND TOWNS:

1. It was no doubt the intention of the framers of the constitution that cities and towns, organized after its adoption, should be organized under general and not special laws. Section 13, article XIV. But that it was not intended to interfere with the city of Denver, and other cities and towns acting under special charters previously granted by the territorial legislature, is apparent from section 14 of article XIV. *Brown v. The City of Denver*, 305.

CODE: See PLEADING AND PRACTICE.

COLLATERAL PROCEEDING: See PRACTICE; JUDGMENT.

COMMISSIONS:

1. Where a broker, employed to sell real estate within "a short time," found a purchaser to take at the price fixed by the vendor, the vendee paying down a small sum to bind the bargain, and no notice being given the broker of withdrawal or change of terms, *held*, that two weeks was reasonable time within which to find a purchaser, and that a rise in value was no defense against the broker, seeking to recover commissions. *Smith v. Fairchild et al.*, 510.

COMMON CARRIERS:

1. In the absence of special contract, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy. *The Overland M. & E. Co. v. Carroll*, 48.

2. But it is held that, upon grounds of public policy, they cannot, even by contract, shield themselves from responsibility from loss or injury, nor limit the amount to less than the value of the loss, by the negligence of themselves, their agents, employees or servants. *Ib.*

3. The terms of the contract limiting liability, being for the benefit of the company, must be construed most strongly against it. A contract undertaking to limit the liability to that of a mere forwarder does not relieve the company from the exercise of ordinary care while the goods are in its possession. *Ib.*

CONDEMNATION PROCEEDINGS: See EMINENT DOMAIN; COUNTY COURTS, 4, 5, 7.

CONSIDERATION:

1. There is no such thing as a general denial in pleading under the code; a specific denial is required to each and every allegation in the complaint intended to be controverted. In an action on a promissory note it is proper to plead the want of consideration by specific averment, and in such case an issue is formed without a reply. *Alden v. Carpenter*, 87.

2. Where there is ample consideration for an agreement on both sides, and the party who does not sign it acts under it without objection, the agreement, when acted on, may become binding upon both parties, and the writing serve as evidence of the terms of the contract between them. *Cary v. McIntyre*, 178.

See ASSIGNEE, 2.

CONSTITUTIONAL LAW:

1. The doctrine of this court is that section 21, article 5, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force. *The People ex rel. v. Fleming*, 230.

2. The provision in the statute (Laws 1879, p. 159, sec. 1), concerning taxes for road purposes, exempting from such taxes all property within the limits of incorporated towns or cities, is in conflict with sections 3 and 6 of article X of the state constitution, and is therefore void. *Board of Com'rs Gunnison County v. Owen et al.*, 487.

3. Had the legislature undertaken to commute this tax for an equivalent burden to be borne by cities and towns, or provided that the tax collected from property within such corporations should be expended on the streets thereof, or declared that a similar and equal tax should be collected and expended therein, the objection might have been obviated. *Ib.*

4. The unconstitutionality of one part of a statute does not necessarily render the residue thereof void. *Ib.*

5. A special charter granted to a municipal corporation before the adoption of the constitution is not abrogated by that instrument unless in conflict therewith. *The People ex rel. Mills v. Jobs*, 475.

6. The office of police judge, with jurisdiction to enforce town ordinances, is authorized by section 1, article VI, of the constitution. *Ib.*

7. The unconstitutionality of one part of a statute does not necessarily render the whole of the statute void. *Ib.*

See CHARTERS; STATUTES.

CONSTRUCTION OF STATUTES:

1. Where an office was recognized under the organic act of the territory, and where the same office is recognized under the state constitution, it is a matter of no consequence that the existence thereof under the former instrument was by virtue of certain powers conferred upon justices of the peace, while under the latter its validity depends upon a provision relating to judicial officers for cities and towns. *People ex rel. v. Jobs*, 589.

2. It is a fundamental rule of interpretation that every law is adopted as a whole; and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. The intent and purpose of a law is to be considered in its interpretation. *The People ex rel. v. Osborne*, 605.

See STATUTES.

CONTEMPT:

1. It is within the discretion of the court to refuse an attachment for a witness, who, after being subpoenaed, refuses to attend and testify; and the refusal of the court to issue an attachment will not warrant this court in reversing the finding, in the absence from the record of what it was expected to prove by such witness. *People ex rel. v. Commissioners of Grand Co.*, 190.

2. For an attorney to stop a judge of a court on the street, and use abusive language to him concerning any judicial action in a case pending before such judge, is such misconduct in office as will warrant the striking of his name from the roll of attorneys. *The People ex rel. v. Green*, 237.

3. In such case it is not necessary that the indignity or insult to the judge should occur in open court, nor that it constitutes a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor. *Ib.*

4. Proceedings for contempt may be termed a police regulation or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it, while proceedings for the disbarment of an attorney are intended to protect generally the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those intrusted with their legal business. *Ib.*, 244.

5. The power to act in connection with contempt is lodged with the court before or against whom the offense is committed. Authority for proceeding in disbarment is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession. The former is punished by fine or imprisonment, and may be largely *ex parte*. The sole penalty in connection with the latter is a prohibition from practicing in the courts of record, and this judgment can only be entered upon notice of charges preferred, and opportunity for defense. A contempt may constitute a ground for disbarment; but it by no means follows that the cause for disbarment must, in all cases, constitute a contempt. *Ib.*

6. If a judge and attorney meet outside the court room and engage in an altercation about some matter in no way connected with judicial action, they are, and ought to be, upon precisely the same footing, in all respects, as other private citizens; when the attorney, by wilful misconduct toward a judge, on account of judicial acts, interferes with or impedes the dignified and proper administration of the law, or is guilty of conduct which tends to do so, whether in the court room or on the street, he is guilty of official misconduct. *Ib.*

7. No appeal lies from a judgment imposing a penalty for contempt of court. *Teller v. The People*, 451.

CONTINGENT FEES: See EVIDENCE, 3, 4.

CONTINUANCE:

1. Where a defendant filed an affidavit in support of a motion for continuance on the ground of the absence of a witness, and the plaintiff offered to admit that the witness, if present, would swear to what was stated in the affidavit, and the motion being denied, *held*, not error. *Alden v. Carpenter*, 87.

2. Admitting the testimony of an absent witness in order to avoid a continuance is not to be taken as an admission of the truth of such testimony; nor does such admission preclude the party admitting it from rebutting the same on trial. *Ib.*

CONTRACT:

1. In an action brought on an implied liability, a defense setting up a written agreement which presented no valid defense, *held*, not to make the action one upon an express contract so as to defeat a recovery upon the implied obligation. *Jones et al. v. Nathrop et al.*, 1.

2. In the absence of special contract, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy. *The Overland M. & E. Co. v. Carroll*, 43.

3. But it is held that, upon grounds of public policy, they cannot, even by contract, shield themselves from responsibility from loss or injury, nor limit the amount to less than the value of the loss, by the negligence of themselves, their agents, employees or servants. *Ib.*

4. The terms of the contract limiting liability, being for the benefit of the company, must be construed most strongly against it. A contract undertaking to limit the liability to that of a mere forwarder does not relieve the company from the exercise of ordinary care while the goods are in its possession. *Ib.*

5. It is a familiar doctrine of the law of contracts, that, if one party is prevented from fully performing his contract by the fault of the other party, the latter cannot be allowed to take advantage of his own wrong to exempt himself from liability under the contract. *Smith v. Roe*, 95.

6. A condition of an accord agreement, like that of any other contract, may be waived by the parties thereto. *Cary v. McIntyre*, 173.

7. Where there is ample consideration for an agreement on both sides, and the party who does not sign it acts under it without objection, the agreement, when acted on, may become binding upon both parties, and the writing serve as evidence of the terms of the contract between them. *Ib.*

8. Where, by contract, one is employed by another to do work by the day or month, and nothing is said as to the time of payment for the services to be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. Such services are comprehended within the meaning of the statute, and after demand for the amount due the laborer may maintain attachment. *De Lappe v. Sullivan*, 182.

9. Obligation, as employed in section 1884 of the General Statutes, and section 14 of the code (section 13, Code of 1883), does not embrace or apply to oral contracts. *Exchange Bank v. Ford et al.*, 814.

10. An agreement signed by but one party thereto, without any present consideration passing, is a naked promise, and, at least until part performance, cannot be enforced by or against either party. *Wells v. Francis et al.*, 896.

11. Upon discovery of fraud in a contract of sale, the vendee has his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages, either by original action or as a counterclaim to an action against him for the purchase money brought by the party committing the fraud. *Herfort v. Cramer*, 483.

12. It is well settled that the good will of a business may have a property value and form the subject-matter of a contract and sale; and the contract being an entirety, for the stock and good will, the vendor may not relieve himself of liability by proving that the stock was worth the amount of the purchase money. *Ib.*

CONTRACT — Continued.

13. If the property sold is more valuable than the consideration expressed in the contract, the profits of the bargain legitimately belong to the purchaser. *Ib.*

14. The provision in a grading contract, for submitting to the chief engineer of one of the contracting parties, for final decision, disputes upon matters referred to in the contract, is valid and binding. It is simply the declaration which contracting parties have a right to make, as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case such disputes arise. And the decision of the engineer thereon, in the absence of fraud or palpable mistake, is final. *Denver, S. P. & P. Ry Co. v. Riley*, 494.

15. Under section 28 of the code, action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides. *Bean v. Gregg*, 499.

16. Where a broker, employed to sell real estate within "a short time," found a purchaser to take at the price fixed by the vendor, the vendee paying down a small sum to bind the bargain, and no notice being given the broker of withdrawal or change of terms, held, that two weeks was reasonable time within which to find a purchaser, and that a rise in value was no defense against the broker, seeking to recover commissions. *Smith v. Fairchild et al.*, 510.

17. Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term without fault on his part, he has a right of recovery, either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge. *Saxonia M. & R. Co. v. Cook*, 569.

18. In an action for a breach of contract, in such case, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. *Ib.*

19. In such case the plaintiff cannot recover the wages accruing for the balance of the term as a matter of course. He is bound to use reasonable efforts to secure labor elsewhere. If he secures labor, or by reasonable diligence might have done so, the amount received, or that might have been received, must be deducted from the amount of damages occasioned by the breach of the contract. *Ib.*

20. While the defendant may mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is on the defendant. *Ib.*

See EQUITY, 3.

CONVEYANCE:

1. An act of congress containing no words of present grant does not of itself operate as a conveyance of the legal title to land. *Schwenke v. Union D. & R. R. Co.*, 513.

CORPORATION:

1. Where a banking corporation, under the statute, fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture. *The People ex rel. v. City Bank*, 226.

CORPORATION — *Continued.*

2. A corporate existence and validity of the acts of a *de facto* corporation whose user is established cannot be attacked collaterally upon the ground of an irregularity or omission in its certificate of incorporation. *City of Denver v. Mullen et al.*, 845.

8. Articles of incorporation which declare an intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads, in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," held, not to indicate an attempt to create an ordinary railroad company, under sec. 838 *et seq.*, General Statutes. *People ex rel. v. Cheesman et al.*, 878.

4. In this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority. *Ib.*

5. The failure of the notary public before whom articles of incorporation are acknowledged, to certify that the parties acknowledging the same are personally known to him, is not fatal. A certificate that the persons whose names are signed to the articles (giving them) appeared before the notary and acknowledged the same, is sufficient. Neither the provisions of the statute as to the acknowledgment of deeds, nor the reasons therefor, apply to the acknowledgment of articles of incorporation. *Ib.*

See MUNICIPAL CORPORATIONS.

COSTS:

1. In the absence of any statutory provision, the general rule is that costs abide the event of the suit, and in case of a change of venue from the county court, on the ground of the disqualification of the judge, there is no authority to make the payment of costs a condition precedent to such change of venue. *O'Connell v. Garrett*, 40.

2. Though no fees are fixed by the statute for the care of property held by a sheriff under attachment, yet the rule is now settled that the officer is entitled to reimbursement for such reasonable charges therefor as may be allowed as costs by the court or judge. *The City Bank of Leadville v. Tucker*, 220.

8. In such case the plaintiff who sues out the attachment and causes the levy is liable, if his suit be dismissed, to the sheriff for such sum as may be so allowed, and it is proper to tax these charges as part of the costs in the case. *Ib.*

4. In such case, if the amount taxed is excessive, the plaintiff, by motion to retax, has a remedy for the enforcement of his rights, as complete as if the sheriff were required to bring an action for such expenditures, the reasonableness of which he might contest by answer. *Ib.*

See PRACTICE, 14, 15.

COUNTY COURTS:

1. Under section 75 of the code, a county court may reinstate a cause after the expiration of the term at which it was dismissed, and a district court has no power, in a collateral proceeding, to pass

COUNTY COURTS—*Continued.*

upon the validity of an order made by the county judge reinstating a cause upon the docket of the county court. *Hughes v. Cummings et al.*, 188.

2. A county court does not lose its jurisdiction of its judgment in a cause appealed thereto from a justice of the peace upon the filing and recording a transcript of the judgment rendered by the justice in the office of the clerk of the district court. *Ib.*

3. The jurisdiction of a county court must, in a collateral proceeding, be tested by its own record. *Ib.*

4. In a proceeding under a statute affording a provisional remedy for a special purpose, the same principles must apply which are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of jurisdiction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action. *The Denver, W. & P. Ry Co. v. Church*, 143.

5. In such case the costs *held* to be rightfully taxed against the party bringing the action in the county court when it might have been brought and determined in the district court, which had concurrent and unlimited jurisdiction in such cases. *Ib.*

6. Where, on error to a county court, the record shows that testimony was produced on the trial in support of the complaint, but has not been preserved, and the finding and judgment having been for the plaintiff, the presumption obtains that the allegations of fact on part of the plaintiff were duly proven. *Dusing v. Nelson*, 184.

7. In condemnation proceedings under the statute, in the county courts, such courts are without jurisdiction where the amount of the award is in excess of \$2,000. *The Denver & R. G. Ry Co. v. Otis et al.*, 198.

8. Upon appeal from a judgment of a justice of the peace the cause stands in the county court for trial *de novo*. *Bassett v. Inman*, 170.

9. In an action of forcible entry and detainer, under the statutes of this state, an appeal does not lie from a judgment of a county court to this court. *Brundenburg v. Reithman*, 823.

10. It is doubtful whether the correctness of the ruling of a county court, in denying an appeal to this court in such a case, can be presented on a writ of error to the original judgment. *Ib.*

11. Where a tenant occupied premises for several years, and then entered into a lease for one year certain, *held*, under the facts in this case, that his former occupancy did not inure to his benefit and constitute him a tenant from year to year, upon his holding over after the expiration of his lease, and so entitle him to three months' notice to quit, under the statute. *Ib.*

12. There is nothing in the statute requiring the jurisdictional averment to be in a prescribed form in an action in a county court. The requirements of the statute are satisfied by averments in the complaint which are equivalent to an allegation that the amount in controversy does not exceed \$2,000. *Hughes v. Brewer*, 533.

COUNTY SEATS:

1. The removal of county seats is a subject over which the law-making power has plenary jurisdiction and control. In the absence of constitutional restrictions, a removal could be authorized upon any vote, great or small, which that body deemed advisable. *Alexander et al. v. The People*, 155.

COUNTY SEATS — *Continued.*

2. When the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale, and, having fixed in the statute the vote which shall be required, it becomes the paramount law, and nothing is left for implication. *Ib.*

3. The act of 1876, requiring a two-thirds vote in favor of the removal of county seats, has no application to the county of Grand. *People ex rel. v. Commissioners of Grand County*, 190.

CREDITORS:

1. *Bona fide* creditors should be accorded preference over a secret and hidden equity against the property of the debtor, of which he knew nothing at the time of giving credit; and provision to this end may be effectual in a decree entered in a suit to which such creditors are not parties by "saving their rights." *Buck v. Webb et al.*, 212.

2. In an action by a creditor to enforce his right of precedence over the holder of such secret trust, all the parties in interest may be joined and the whole controversy settled in one suit. *Ib.*

See STATUTE OF FRAUDS, 2.

CROPS:

1. It is the duty of the herder in charge of a flock of sheep to use ordinary care to prevent their trespassing upon crops, and, in the absence of such care, the owner will be held responsible for resulting damages. *Morris v. Fraker*, 5 Col. 425, distinguished. *Willard v. Mathesus*, 76.

DAMAGES:

1. Damages for breach of contract can only be recovered when they are averred and proved as the natural, direct and certain result of the breach, excluding probable profits and prospective or speculative damages. *Jones et al. v. Nathrop et al.*, 1.

2. When it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the damages must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise at the trial. *Tucker v. Parks*, 62.

3. By the terms of the constitution the compensation for taking or damaging private property, against the owner's consent, must be ascertained by a jury or board of commissioners. This requirement cannot be dispensed with by legislative enactment. And under the statute the ordinary civil action cannot be resorted to, but the object can only be reached by special proceedings under the act on the subject of eminent domain. *Tripp et al. v. Overocker et al.*, 72.

4. Abutting lot owners have a peculiar interest in the street not shared by others. Their easement is property within the meaning of our constitution, and any interference therewith which results in injury will (with certain exceptions) be justly compensated — there being a *damaging*, if not a *taking*, of private property. Whatever interference with the street permanently diminishes the value of their premises is as much a damage as though caused by direct physical injury thereto. *City of Denver v. Bayer*, 118.

5. But sometimes these interferences and the resulting injury may properly, even in this state, be held to be *damnum absque injuria* — as where they are occasioned by a reasonable improvement of the:

DAMAGES — *Continued.*

street by the proper authorities for the greater convenience of the public; or where a temporary inconvenience or injury results from a legitimate use thereof by the public. In purchasing his lot or dedicating the easement to the public, the abutting owner is conclusively presumed to have contemplated the power and authority of the city council to skilfully make reasonable changes and improvements, by raising or lowering the grade, or otherwise. But these presumptions attach only when the purpose of the change is to render the street more convenient and useful as a public highway. *Ib.*

6. While it may be said that bridges, culverts, and even street railways, are matters contemplated by the lot owner when he purchases, no such presumption applies to the use of the street by an ordinary railroad. *Ib.*

7. For any injury and annoyance occasioned by such railroad, which are peculiar to an abutting owner, and not shared by the general public — which affect his property and impair its value without injuring that of his neighbor, — he ought to receive compensation, though the city hold the fee and grant the right of way. *Ib.*

8. If the city by ordinance only gives consent on behalf of the corporation and the public that the street may be used by a railroad, the city would not be liable; and if it was intended by the ordinance to confer upon the railroad company a right to use the street without compensation to adjoining owners, where permanent injury resulted from such use, the ordinance is, in this respect, *ultra vires* and void. The relation of principal and agent does not exist in such case. *Ib.*

9. For injuries of this kind a single recovery can be had for the whole damage to result from the act. The measure of compensation (in suit between the proper parties) is the actual diminution in the market value of the premises, for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street. *Ib.*

10. In this case *held*, that if it be conceded that defendant would be entitled, upon a proper showing, to damages by way of set-off against the plaintiff's demand, he proved no damages, and therefore cannot be heard to complain after judgment. *James v. Duke*, 283.

11. Where the amount of damages does not depend on computation, as in case of personal injuries, to warrant the court in setting aside the verdict as excessive, it must appear that the amount of damages given by the jury is so disproportionate to the injury received, as to show that the jury were influenced by prejudice, misapprehension, or some corrupt or improper consideration. *City of Denver v. Dunsmore*, 323.

12. The rule for the estimation of damages resulting from fraudulent representations in the sale of both real and personal property is the same. It is to ascertain the difference between the value of the property as it actually existed on the day of sale, and its value as it was represented to be. *Herfort v. Cramer*, 433.

13. In alleging damages it is only necessary to particularly specify the items, when the damages claimed are not the direct and necessary consequence of the wrong complained of. *Ib.*

14. Where a complaint failed to state sufficient facts to show wherein the refusal of defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass or detention, *held* bad on demurrer. *Brandenburg v. Miles*, 537.

DAMAGES — Continued.

15. In civil actions for injury resulting from torts, where the offense is punishable under the criminal laws, exemplary damages, as a punishment or example, cannot be awarded. *Quære*, whether the recovery in all cases should not be limited to a liberal rule of compensatory damages? *Murphy v. Hobbs*, 541.

See CONTRACT, 17, 18, 19, 20.

DECLARATIONS:

1. Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible. *Stone v. O'Brien*, 458.

DEED:

1. In an action of ejectment for the possession of real estate, being part of a town site on the public domain, a deed which is regular upon its face, and executed by the officer intrusted by the government with the legal title, and duly authorized to convey it, is not impeachable for failure to comply with any preliminary requisites. *Anderson et al. v. Bartels*, 256.

2. In such case the doctrine of presumptions in favor of official acts obtains, that the officer empowered by law to make the grant did his duty in all respects, and had required the grantee to show, by legal proofs, that he had complied with all rules and regulations necessary to be complied with to entitle him to the deed. *Ib.*

3. The execution and delivery of such a deed to a portion of the Denver town site, under the provisions of the laws in relation to the subject, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title. *Ib.*

4. Where no defect of title or authority exists, and the land is subject to sale, it is held that the officers of the land department, in the course of their duties, exercise a judicial function, and their acts cannot be impeached in a collateral action; and in this case, *held*, that the duties and powers of the probate judge were not merely ministerial, but that in executing the provisions of the congressional and legislative acts relating to the grant he was called upon to and required to exercise judicial discretion and powers. *Ib.*

5. In an action to cancel and set aside a deed of record, on the ground that it was never delivered, and its possession procured by the grantee by fraud — the grantee being dead, his heirs are necessary parties. A complaint against the executrix only, *held* bad on demurrer. *Snyder v. Voorhies*, 296.

DEFAULT:

1. The taking a default against a defendant upon failure to plead is a privilege of the plaintiff, and, if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain. *Manville v. Parks et al.*, 128.

2. There is no difference in principle between a final judgment against a defendant in default for failure to answer and a judgment against defendant *nul dicit*. *Ib.*

DEMAND:

1. Where property is found by the officer in the actual custody of the person named in his execution, the levy thereon gives the officer lawful possession; and in such case a demand is an essential prerequisite to suit in replevin against the officer. But when the property is found in custody of a stranger to the writ, the officer's possession under his levy is wrongful and no demand is necessary. *Stone v. O'Brien*, 458.

DENVER:

1. The authority conferred by the act of 1861, incorporating the city of Denver, in respect to the control of the streets by the city, cannot be extended to invalidate the acquisition thereafter by ditch proprietors of the right of way through the lands which were then a part of the public domain, and prior to the acquisition of title thereto by the city, although the streets had been previously laid out and used as streets. *City of Denver v. Mullen et al.*, 345.

See CHARTERS.

DIVERSION:

1. A change of the point of diversion on the same stream does not affect the priority acquired by the original appropriation, provided the quantity of water diverted remains the same, and no intervening appropriator is injured. *Sieber et al. v. Frink et al.*, 148.

DIVORCE:

1. The decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review of the decree when property rights are involved. *Israel v. Arthur et al.*, 12.

EASEMENTS: See DAMAGES, 4, 5, 6, 7, 8, 9, 10.

EJECTMENT:

1. In ejectment one tenant in common may recover possession of the entire tract as against all persons but his co-tenants. *Weese et al. v. Barker et al.*, 178.

2. In an action of ejectment for the possession of real estate, being part of a town site on the public domain, a deed which is regular upon its face, and executed by the officer intrusted by the government with the legal title, and duly authorized to convey it, is not impeachable for failure to comply with any preliminary requisites. *Anderson et al. v. Bartels*, 256.

3. In such case the doctrine of presumptions in favor of official acts obtains, that the officer empowered by law to make the grant did his duty in all respects, and had required the grantee to show, by legal proofs, that he had complied with all rules and regulations necessary to be complied with to entitle him to the deed. *Ib.*

4. The execution and delivery of such a deed to a portion of the Denver town site, under the provisions of the laws in relation to the subject, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title. *Ib.*

5. Where no defect of title or authority exists, and the land is subject to sale, it is held that the officers of the land department, in the course of their duties, exercise a judicial function, and their acts cannot be impeached in a collateral action; and in this case, *held*, that the duties and powers of the probate judge were not

EJECTMENT — Continued.

merely ministerial, but that in executing the provisions of the congressional and legislative acts relating to the grant he was called upon to and required to exercise judicial discretion and powers. *Ib.*

EMINENT DOMAIN:

1. A statute which assumes to limit or direct the compensation to be paid for private property, when taken for public or private use, is to that extent unconstitutional. *Tripp et al. v. Overocker et al.*, 72.

2. When, however, part only of an act is unconstitutional, it does not necessarily follow that the whole statute must fall, and the same is true of the different portions of the same section. Whether the valid portions shall be enforced depends upon the design of the entire law, and their connection with the void provisions. The act should be sustained, if the unconstitutional portions can be stricken out and the law still be such as to accomplish the purpose of the legislature. *Ib.*

3. By the terms of the constitution the compensation for taking or damaging private property, against the owner's consent, must be ascertained by a jury or board of commissioners. This requirement cannot be dispensed with by legislative enactment. And under the statute the ordinary civil action cannot be resorted to, but the object can only be reached by special proceedings under the act on the subject of eminent domain. *Ib.*

4. In condemnation proceedings under the statute, in the county courts, such courts are without jurisdiction where the amount of the award is in excess of \$2,000. *The Denver & R. G. Ry Co. v. Otis et al.*, 198.

See COUNTY COURTS, 4, 5.

EQUITY:

1. In equity the rule is, that all persons materially interested in the result should be made parties to the suit. *Wells v. Francis et al.*, 396.

2. The relation of the parties to a title bond is that of mortgagor and mortgagee; the action for a vendor's lien is analogous to the foreclosure of a mortgage; and the rule that a person claiming adversely to the title mortgaged need not be made a party applies to the former as well as the latter action. A strong analogy also exists between the action for a vendor's lien and a suit for specific performance, but in the latter the above rule as to adverse claimants likewise prevails. *Ib.*

3. If it does not appear on the face of a contract, or otherwise, that the trustees act as agents, or in a fiduciary capacity, it is unnecessary to go beyond the terms of the contract. *Ib.*

4. Adverse claimants of title to realty cannot resist the suit of one joint tenant therefor, on the ground that his co-tenants are not asserting their interests in the same action. *Ib.*

5. The general rule that a judgment or decree is inadmissible as evidence, except in suits between parties or privies thereto, is not inflexible; it is sometimes admissible between others as an introductory fact to an important link in a chain of title relied upon. *Ib.*

6. The action for a vendor's lien may be maintained against one holding actual possession under a title bond of a part of the public domain, with extensive and valuable improvements thereon. *Ib.*

7. A patent which is not void on its face for fraud or irregularity in procuring the same can only be impeached therefor in a direct proceeding to set it aside. *Ib.*

EQUITY — Continued.

8. Title procured to that which may properly be termed a trust estate, by the trustee, for his own advantage, and against the interest, and without the consent, of his beneficiary, will be declared in equity to be held in trust for the latter. And one who, with full knowledge of the situation, colludes with the trustee in procuring such adverse title is in no better position than the trustee himself. *Ib.*

9. An agreement signed by but one party thereto, without any present consideration passing, is a naked promise, and, at least until part performance, cannot be enforced by or against either party. *Ib.*

10. It is the duty of a court of equity to render exact justice between the parties before it in each particular case, so far as such a course is consistent with that certainty in legal rules and security of legal rights which must form the basis of all stable jurisprudence. And a court of equity will refuse its aid to give the plaintiff what the law would give him if the courts of common law had jurisdiction, without imposing upon him conditions relating to the subject-matter in controversy which the court considers he ought to comply with, although the subject of the condition is one the court would not otherwise enforce. *Ib.*

See PLEADING, 8, 9, 10, 11.

ERROR:

1. The decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review of the decree when property rights are involved. *Israel v. Arthur et al.*, 12.

2. When an attorney takes a case upon a contingent fee, and on his own account employs an attorney to assist him in the case, upon promise of a "good fee" for the services he shall render, it is error, upon the trial of an action for such service, to admit testimony showing the amount realized by the attorney whose compensation rested on the contingency. *Wells et al. v. Adams*, 26.

3. The value of an attorney's services in a given case is to some extent governed by the amount in controversy, and the consequent responsibility resting on him, and it is not error to admit evidence of the value of the property in controversy. *Ib.*

4. It is error to allow an answer to a hypothetical question which does not conform to the facts in evidence. *Ib.*

5. The statements of a person not a party to the record must be rejected as hearsay. Secondary evidence of the contents of a letter should not be admitted, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found. *Ib.*

6. It is not error to permit an answer to be filed after the statutory period for answering has expired — no default having been entered. *Quære*, whether the code renders it necessary in such case to obtain leave of the court to file answer. *Sieber et al. v. Frink et al.*, 148.

7. The supreme court will not consider errors not excepted to below. It is the province of the jury to determine the weight of testimony when conflicting. *Ralph v. Weary*, 217.

8. Error cannot be maintained upon the refusal of the court to give an instruction not applicable to the case made by the evidence. *De Walt v. Hartzell et al.*, 601.

ESTRAYS:

1. Under the statute (General Laws 1877, section 2565), no one but a householder is authorized to take up an estray animal, and he only when it is found in the vicinity of his residence. *Weber v. Hartman et al.*, 18.
2. Estrays cannot be lawfully used by the taker-up, unless to use them be necessary to preserve them from injury, and for the benefit of the rightful owner. *Ib.*
3. The using of estrays, save as to the exception mentioned, is tortious, and the taker-up thereby forfeits his claim for compensation. *Ib.*

EVIDENCE:

1. As a general rule, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is on the defendant to show that it related to another debt either wholly or in part. *Morrell v. Ferrier*, 23.
2. When an attorney takes a case upon a contingent fee, and on his own account employs an attorney to assist him in the case, upon promise of a "good fee" for the services he shall render, it is error, upon the trial of an action for such service, to admit testimony showing the amount realized by the attorney whose compensation rested on the contingency. *Wells et al. v. Adams*, 26.
3. The value of an attorney's services in a given case is to some extent governed by the amount in controversy, and the consequent responsibility resting on him, and it is not error to admit evidence of the value of the property in controversy. *Ib.*
4. It is error to allow an answer to a hypothetical question which does not conform to the facts in evidence. *Ib.*
5. The statements of a person not a party to the record must be rejected as hearsay. Secondary evidence of the contents of a letter should not be admitted, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found. *Ib.*
6. It is a familiar rule that evidence cannot be given of facts not alleged in the pleadings, and that neither admissions nor stipulations can make a case broader than it is by allegation. Neither can a party have relief beyond what the averments of his pleadings entitle him. *Tucker v. Parks*, 62.
7. The unsworn declarations of parties touching their qualifications as voters, after the election, and who were not present at the trial to contradict or explain such declarations, held to have been properly excluded as mere hearsay. *People ex rel. v. Commissioners of Grand County*, 190.
8. The statute of frauds has changed the rule of evidence, not the rule of pleading. A plea which set forth a contract for the conveyance of real estate is good on demurrer, though it does not aver that the contract was in writing — it not appearing in the plea that it was *not* in writing. *Tucker v. Edwards*, 209.
9. The weight of evidence does not wholly consist in its volume nor in the number of individuals sworn. *Green v. Tuney*, 278.
10. Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was

EVIDENCE — Continued.

the actual owner, such declarations are not admissible. *Stone v. O'Brien*, 458.

11. Where there is direct conflict in the evidence, it is the province of the jury to determine to whom credit should be given, and the verdict, not being clearly opposed to the weight of evidence, will not be disturbed. *Barth et al. v. Jones et al.*, 464.

12. The code (1888, section 387) provides that printed copies in volumes of statutes, or other written law of any other state or territory or foreign government, purporting or proven to have been published by the authority thereof, shall be admitted by courts on all occasions as presumptive evidence of such laws. *Bruckman v. Taussig*, 561.

13. The admissibility of an "additional" location certificate is not affected by the circumstance that it was filed subsequent to the commencement of the suit. It is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the adverse party. *Strepey et al. v. Stark et al.*, 614.

14. Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. And such certificate, when recorded, is competent evidence to show the date of location, the description of the premises, and that the statute requiring such certificate to be made out and recorded has been complied with. *Ib.*

See MALICIOUS PROSECUTION, 2, 3.

EXCEPTIONS:

1. A referee was directed to try the issues presented and report findings upon the law and facts; exceptions were reserved and subsequently overruled, and judgment entered by the court on the referee's report; but no exceptions being reserved either to the ruling upon the issues presented by the report and the exceptions thereto nor to the final judgment rendered by the court, *held* that this court is precluded from reviewing the judgment on the evidence. *Poire v. Rocky Mountain T. Co.*, 588.

EXECUTION:

1. The levy of a writ of attachment issuing out of a district court being followed by judgment, and execution having issued within a reasonable time, *held*, that the plaintiff's lien upon the attached property was preserved as against a special execution issuing out of a county court on a junior judgment in favor of another party; also *held*, that an objection that a general, instead of a special, execution was issued against the attached property would be unavailing. *Brown et al. v. Tucker*, 80.

EXECUTOR:

1. The preponderance of American decisions tends to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may be advantageous to the estate, and such advantage is the main thing to be considered. *Dusing v. Nelson*, 184.

2. When it becomes necessary to save the estate from loss, it is right, and even obligatory, for the executor or administrator to purchase or take possession of land at the foreclosure of a mortgage belonging to the estate, and to hold the title for the benefit of the estate. *Ib.*

EXEMPLARY DAMAGES: See DAMAGES.**EXEMPTIONS:**

1. There is no prescribed form for making a claim of exemption of property from levy under attachment. *Bassett v. Inman*, 270.

2. A traverse of the affidavit in attachment does not waive the right to claim the property attached as exempt. *Ib.*

3. Homestead exemption is entirely the creature of statute; but the statute is not in derogation of the common law, since at common law the creditor had no right to sell the debtor's land. Hence the rule that these statutory provisions are to be liberally construed, for the purpose of giving effect to the beneficent object in view, has been clearly established. *Barnett et al. v. Knight et al.*, 365.

4. Under the Colorado statute, the homestead is not exempt until the owner elects to make it so, which election is evidenced by so indorsing upon the margin of the record of the deed. Such indorsement being made, the homestead, to the extent of \$2,000 in value, becomes exempt from execution or attachment upon any indebtedness arising after February 1, 1868. The householder is in ample time if he records this election before a lien attaches in favor of a creditor whose debt arose subsequent to that date. *Ib.*

5. As to exempt property, there are within the statute of frauds no creditors; so that the sale of a homestead is no fraud upon the rights of creditors of the grantor — the same not being subject to their debts. The exemption law and statute of frauds are *in pari materia*, and must be construed together. *Ib.*

EXPERTS:

1. When the jury have before them all the facts and circumstances attending and surrounding a transaction, the opinions of experts as to value, based upon the same evidence, are not conclusive; these opinions are not to be substituted for the common sense and judgment of the jury. The purpose of their introduction is to supplement the general knowledge and experience of the jury. *Leitensdorfer v. King*, 436.

2. The court, in furtherance of justice, may, in its discretion, allow the usual order of introducing testimony to be departed from. When the defense relies upon expert testimony, it is entitled to put it in after all the evidence bearing on the question offered by plaintiff. And if the court allows plaintiff to vary the state of facts after the expert testimony has been heard, the expert witnesses may be recalled. If no offer to recall them be made, the case will not be reversed. *City of Denver v. Dunsmore*, 323.

EXPRESS COMPANIES:

1. In the absence of special contract, express companies are subject to the same liability as other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy. *The Overland M. & E. Co. v. Carroll*, 43.

2. But it is held that, upon grounds of public policy, they cannot, even by contract, shield themselves from responsibility from loss or injury, nor limit the amount to less than the value of the loss, by the negligence of themselves, their agents, employees or servants. *Ib.*

3. It being the custom to require valuable packages to be sealed before receiving for shipment, it is negligence to receive an unsealed package, or to ship it unsealed. Nor can the company, so in de-

EXPRESS COMPANIES—Continued.

fault, be excused by the fact that the loss may have occurred on one of the subsequent connecting lines. *Ib.*

4. The terms of the contract limiting liability, being for the benefit of the company, must be construed most strongly against it. A contract undertaking to limit the liability to that of a mere forwarder does not relieve the company from the exercise of ordinary care while the goods are in its possession. *Ib.*

FEEs: See **COSTS.**

FENCES:

1. It is the duty of the herder in charge of a flock of sheep to use ordinary care to prevent their trespassing upon crops, and, in the absence of such care, the owner will be held responsible for resulting damages. *Morris v. Fraker*, 5 Col. 425, distinguished. *Willard v. Mathesus*, 76.

FORCIBLE ENTRY AND DETAINER:

1. In an action of forcible entry and detainer, under the statutes of this state, an appeal does not lie from a judgment of a county court to this court. *Brandenburg v. Reithman*, 323.

2. It is doubtful whether the correctness of the ruling of a county court, in denying an appeal to this court in such a case, can be presented on a writ of error to the original judgment. *Ib.*

3. Where a tenant occupied premises for several years, and then entered into a lease for one year certain, *held*, under the facts in this case, that his former occupancy did not inure to his benefit and constitute him a tenant from year to year, upon his holding over after the expiration of his lease, and so entitle him to three months' notice to quit, under the statute. *Ib.*

FOREIGN JUDGMENT:

1. In pleading a judgment of a court of general jurisdiction it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign or one of a court of a sister state. If the court had no jurisdiction, that fact should be raised by defendant's plea. *Bruckman v. Taussig*, 561.

2. Interest may be recovered on a judgment of the court of another state without any averment in the complaint that it is allowed by the statute of the state in which it was recovered. *Ib.*

FOREIGN STATUTES:

1. The code (1883, section 387) provides that printed copies in volumes of statutes, or other written law of any other state or territory or foreign government, purporting or proven to have been published by the authority thereof, shall be admitted by courts on all occasions as presumptive evidence of such laws. *Bruckman v. Taussig*, 561.

FORGERY:

1. An indictment for a statutory offense is sufficient which charges the offense in the language of the statute, or so plainly that the nature of the offense can be easily understood by the jury. *Cohen v. The People*, 274.

2. Upon the trial of one indicted for forgery it is not error to admit evidence tending to prove that the defendant uttered or passed the forged instrument. *Ib.*

3. The statute makes the offense of forgery to consist in the forging or counterfeiting the handwriting of another with the intent to damage or defraud some person. *Ib.*

FORNICATION:

1. Evidence, uncontradicted, that "K. told me, after the indictment was found, that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than other men who went to the row and slept with other women," is sufficient to justify the court and jury to conclude the "overt act" was committed. *King v. The People*, 224.

2. An indictment which charges that "K. * * * and one Martha E. did then and there unlawfully live together in an open state of fornication," is good. *Ib.*

FRAUD:

1. Fraud must be specially pleaded in an answer as well as in a complaint. *Tucker v. Parks*, 62.

2. A court of equity will not interfere to set aside a conveyance on the ground of fraud, at the suit of a general judgment creditor, where the debtor has other property subject to execution; and, in such case, a bill which fails by proper averment to allege insolvency, or facts sufficient to indicate that the judgment cannot be collected without equitable aid, is fatally defective; and the defect is not cured by evidence of insolvency. *Emery v. Yount*, 107.

3. Before a court of equity is authorized to cancel a voluntary conveyance on the ground of fraud upon the creditors of the grantor, it must be alleged and proved that debts existed at the time the conveyance was made, or that it was executed with a view to the creation of future obligations. *Ib.*

4. Upon discovery of fraud in a contract of sale, the vendee has his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages, either by original action or as a counterclaim to an action against him for the purchase money brought by the party committing the fraud. *Herfort v. Cramer*, 483.

GOOD WILL OF BUSINESS: See **CONTRACT**, 11.

GRADING CONTRACT:

1. The provision in a grading contract, for submitting to the chief engineer of one of the contracting parties, for final decision, disputes upon matters referred to in the contract, is valid and binding. It is simply the declaration which contracting parties have a right to make, as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case such disputes arise. And the decision of the engineer thereon, in the absence of fraud or palpable mistake, is final. *Denver, S. P. & P. Ry Co. v. Riley*, 494.

HABEAS CORPUS:

1. *Habeas corpus* will lie when the petitioner is confined under the judgment of a court, to enter which the court had not jurisdiction—as in case of a judgment not based on a valid verdict of conviction. *Garvey's Case*, 384.

2. Certain crimes, including murder, are arranged in grades, one above another, and each higher offense or grade of an offense contains all that is embraced in the one next lower, and something more. It is not necessary that an indictment for any offense shall specify the name of the offense, provided it is in all other respects sufficient. In this class of crimes, whatever the offense alleged in the indictment, there may be a conviction of any other if within the words of the allegation;—an indictment for murder charges also all the lower grades of felonious homicide, and a conviction for manslaughter may be had upon it. *Ib.*

HABEAS CORPUS — Continued.

8. An indictment for murder was found by the grand jury. Subsequently an act of the legislature was passed without a saving clause, which rendered it illegal to convict the accused of the crime of murder, but did not affect the law as to the punishment for manslaughter. *Held*, that the accused, under that indictment, might be tried for the latter offense. *Ib.*

4. In such case, the fact that the accused has been tried under said indictment, convicted of murder, and judgment pronounced upon the verdict, which judgment was reversed because of error in entering the same — the law having been so modified as to forbid the judgment, — will not warrant his discharge on the ground of former jeopardy when subsequently tried for manslaughter on the same indictment. *Ib.*

5. The verdict is the foundation of the judgment, and when the latter is reversed because the law did not authorize the former, both are set aside and are of no effect; — judgment for murder being reversed and the cause remanded for further proceedings, the court cannot, upon such verdict for murder, enter judgment for manslaughter without a retrial of the cause. One so convicted may be released from the penitentiary on *habeas corpus*, and remanded to the custody of the sheriff to await trial. *Ib.*

6. The justices of this court, acting singly out of term, are without jurisdiction to issue writs of *habeas corpus*, or to hear and determine matters arising thereon, notwithstanding the authority attempted to be conferred by the statute on *habeas corpus*. *In re Garvey*, 502.

7. The proceeding by *habeas corpus* is the proper remedy, under the statute of this state, to protect the right of persons charged with the higher class of crimes to a speedy trial, according to law. *Ib.*

8. In this case there were four successive terms of the district court, and one of the criminal court, to which the case had been transferred, at each of which the court had jurisdiction; at any one of the terms the petitioner might have been tried, but was not; the failure to try did not happen on the petitioner's application, he being in custody the entire time. *Held*, under the General Statutes (section 1816), upon which the petition is based, that the petitioner be discharged. *Ib.*

HEARSAY:

1. The statements of a person not a party to the record must be rejected as hearsay. Secondary evidence of the contents of a letter should not be admitted, unless the preliminary proof of loss shows a *bona fide* and unsuccessful search in the place where the lost instrument was deposited and last seen, or where it was most likely to be found. *Wells et al. v. Adams*, 26.

HOMESTEAD EXEMPTION:

1. Homestead exemption is entirely the creature of statute; but the statute is not in derogation of the common law, since at common law the creditor had no right to sell the debtor's land. Hence the rule that these statutory provisions are to be liberally construed, for the purpose of giving effect to the beneficent object in view, has been clearly established. *Barnett et al. v. Knight et al.*, 365.

2. Under the Colorado statute, the homestead is not exempt until the owner elects to make it so, which election is evidenced by so indorsing upon the margin of the record of the deed. Such indorsement being made, the homestead, to the extent of \$2,000 in value,

HOMESTEAD EXEMPTION — Continued.

becomes exempt from execution or attachment upon any indebtedness arising after February 1, 1868. The householder is in ample time if he records this election before a lien attaches in favor of a creditor whose debt arose subsequent to that date. *Ib.*

3. As to exempt property, there are within the statute of frauds no creditors; so that the sale of a homestead is no fraud upon the rights of creditors of the grantor — the same not being subject to their debts. The exemption law and statute of frauds are *in pari materia*, and must be construed together. *Ib.*

HOUSEHOLDER:

1. Under the statute (General Laws 1877, section 2565), no one but a householder is authorized to take up an estray animal, and he only when it is found in the vicinity of his residence. *Weber v. Hartman et al.*, 13.

HUSBAND:

1. The decease of the husband after a decree of divorce is granted, and before proceedings in error thereon are instituted, does not operate to prevent a review of the decree when property rights are involved. *Israel v. Arthur et al.*, 13.

IGNORANCE:

1. Wilful ignorance is equivalent in law to actual knowledge. He who abstains from inquiry, when inquiry ought to be made, cannot be heard to say so and rely upon his ignorance. *Mackey v. Fullerton et al.*, 556.

INDICTMENT:

1. An indictment which charges that "K. * * * and one Martha E. did then and there unlawfully live together in an open state of fornication," is good. *King v. The People*, 224.

2. An indictment for a statutory offense is sufficient which charges the offense in the language of the statute, or so plainly that the nature of the offense can be easily understood by the jury. *Cohen v. The People*, 274.

INJUNCTION BONDS: See BONDS.

INSTRUCTIONS:

1. If conflicting and irreconcilable propositions of law are contained in the charge, and it appears that the jury may have been misled thereby, a new trial should be granted; but if, upon a careful consideration of the entire charge, though there be conflict between some portions thereof, it appears that the complaining party could not have been prejudiced by it, the supreme court will not disturb the verdict on account of imperfections therein. *The Overland M. & E. Co. v. Carroll*, 43.

2. Where a transcript does not purport to give all the instructions given on behalf of either party, and the appellant admits that other instructions were given, this court cannot be advised that the refused instructions contain any correct proposition of law, applicable to the case, which was not given to the jury. For the same reason the form of a judgment being omitted from the transcript, objection to it will not be considered. *Tucker v. Parks*, 62.

3. An instruction is fatally erroneous which contains one correct and one incorrect proposition respecting the legal effect of the evidence produced on the trial, and which tells the jury that, if the evidence sustains either proposition, the verdict must be for the plaintiff. *Anderson et al. v. Bartels*, 256

INSTRUCTIONS — *Continued.*

4. Where it is apparent that the party complaining is not prejudiced by an improper instruction given to the jury, the verdict will not be set aside. *Bassett v. Inman*, 270.

5. A party may not take advantage of an erroneous instruction given in his favor, and by which he could not have been prejudiced. *Leitensdorfer v. King*, 436.

6. To warrant the court in instructing the jury that a party was guilty of negligence, the case must be such as to allow no other inference from the evidence. *Colorado Cent. R. R. Co. v. Martin*, 592.

7. Error cannot be maintained upon the refusal of the court to give an instruction not applicable to the case made by the evidence. And under the facts in this case, *held* that the promise upon which action was brought was a promise to pay the liabilities of the promisor, and not such a case as could be brought within the statute of frauds, which was pleaded in bar. *De Walt v. Hartzell et al.*, 601.

INTEREST:

1. Interest may be recovered on a judgment of the court of another state without any averment in the complaint that it is allowed by the statute of the state in which it was recovered. *Bruckman v. Taussig*, 561.

JOINT TENANT: See EQUITY, 4.

JUDGE:

1. Under the code (1877, secs. 431, 442), a judge who, before he went upon the bench, was of counsel in a case, is disqualified from presiding at the trial unless all parties consent that he may. And in such case it is his imperative duty (if county judge), of his own motion or on suggestion, to certify the case to the district court, without requiring petition for change of venue under the statute. *O'Connell v. Gavett*, 40.

JUDGMENT:

1. If the record, being offered in evidence, shows affirmatively that the statute requiring service by publication was not complied with, it may be attacked in a collateral proceeding, and the recital therein that service was had does not change the rule. *Israel v. Arthur*, 5.

2. In an action of attachment under the statute, if the district court has complied with the terms of the statute in respect to obtaining jurisdiction of the person and the subject-matter and in pronouncing its judgment, no authority exists for disregarding or refusing to give effect to such judgment in a collateral proceeding. *Brown et al. v. Tucker*, 80.

3. In an adjudication by a referee, under the statute as to priority of water rights, the decree may be modified for error of the referee in his judgment upon the weight of the testimony. *Dorr v. Hammond*, 79.

4. No appeal lies from an order vacating a judgment. Courts have power over the orders and judgments during the term, and an order made setting aside a judgment rendered during the term, however erroneous, vacates the judgment, and is not subject to review. A subsequent order of the court setting aside the order vacating the judgment does not have the effect to revive or reinstate the judgment. *Owen v. Going et al.*, 85.

JUDGMENT — *Continued.*

5. A strict compliance with forms is not essential in the entry of judgments; yet to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as an entry of judgment. *Stevens v. Solid Muldoon P. Co.*, 86.

6. The taking a default against a defendant upon failure to plead is a privilege of the plaintiff, and, if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain. *Manville v. Parks et al.*, 129.

7. There is no difference in principle between a final judgment against a defendant in default for failure to answer and a judgment against defendant *nil dicit*. *Ib.*

8. Under section 75 of the code, a county court may reinstate a cause after the expiration of the term at which it was dismissed, and a district court has no power, in a collateral proceeding, to pass upon the validity of an order made by the county judge reinstating a cause upon the docket of the county court. *Hughes v. Cummings et al.*, 188.

9. A county court does not lose its jurisdiction of its judgment in a cause appealed thereto from a justice of the peace upon the filing and recording a transcript of the judgment rendered by the justice in the office of the clerk of the district court. *Ib.*

10. The jurisdiction of a county court must, in a collateral proceeding, be tested by its own record. *Ib.*

11. Where an amount is acknowledged in the pleadings to be due plaintiff, it is error to find a verdict or render a judgment for a less amount than that admitted by the pleadings. *Coffman et al. v. Brown*, 147.

12. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed. It is not essential that this be done in term time. *Sieber et al. v. Frink et al.*, 148.

13. A judgment will not be reversed for errors which could not have prejudiced the appellant. *De Lappe v. Sullivan*, 182.

14. If a judgment entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered. *Dusting v. Nelson*, 184.

15. Where, on error to a county court, the record shows that testimony was produced on the trial in support of the complaint, but has not been preserved, and the finding and judgment having been for the plaintiff, the presumption obtains that the allegations of fact on part of the plaintiff were duly proven. *Ib.*

16. The judgment of a court of general jurisdiction cannot be attacked except in a direct proceeding. *Hughes v. Cummings*, 203.

17. The supreme court may reverse, and direct what judgment shall be entered in the court below. *Tucker v. Parks*, 298.

18. Except in certain specified cases, the court has no power to vacate a judgment after the term at which it was rendered. *Exchange Bank v. Ford et al.*, 314.

19. The verdict is the foundation of the judgment, and when the latter is reversed because the law did not authorize the former, both are set aside and are of no effect; — judgment for murder being reversed and the cause remanded for further proceedings, the court cannot, upon such verdict for murder, enter judgment for manslaughter without a retrial of the cause. One so convicted

JUDGMENT — *Continued.*

may be released from the penitentiary on *habeas corpus*, and remanded to the custody of the sheriff to await trial. *Garvey's Case*, 884.

20. The general rule that a judgment or decree is inadmissible as evidence, except in suits between parties or privies thereto, is not inflexible; it is sometimes admissible between others as an introductory fact to an important link in a chain of title relied upon. *Wells v. Francis et al.*, 896.

21. No appeal lies from a judgment imposing a penalty for contempt of court. *Teller v. The People*, 451.

22. A separate judgment may be proper, and may, in some cases, be necessary, whenever a several suit might have been brought. *Irvine et al. v. Wood et al.*, 477.

23. In pleading a judgment of a court of general jurisdiction it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign or one of a court of a sister state. If the court had no jurisdiction, that fact should be raised by defendant's plea. *Bruckman v. Taussig*, 561.

24. In an action by an assignee of a judgment, an averment of the assignment of the judgment is necessary, and a denial of the averment necessarily presents a material issue. *Hughes v. Brewer*, 583.

25. The defendant has the right to controvert and put in issue every material averment of the complaint. This is to be done by means of specific denials, and such denials may be made upon information and belief, when the facts are not presumptively within the defendant's knowledge. *Ib.*

26. Whether an assignment of a judgment is *bona fide*, and the plaintiff the owner of the judgment at the time of action brought, are facts presumptively within the knowledge of the plaintiff, but not presumptively within the knowledge of the defendant. *Ib.*

JUDGMENT CREDITOR: See FRAUD, 2, 3.

JURISDICTION:

1. Where service by publication is relied upon, it must be in a case and under circumstances wherein that mode of acquiring jurisdiction is authorized by the statute, and the material requirements of the statute must be complied with. *Brown et al. v. Tucker*, 80.

2. In an action of attachment under the statute, if the district court has complied with the terms of the statute in respect to obtaining jurisdiction of the person and the subject-matter and in pronouncing its judgment, no authority exists for disregarding or refusing to give effect to such judgment in a collateral proceeding. *Ib.*

3. A county court does not lose its jurisdiction of its judgment in a cause appealed thereto from a justice of the peace upon the filing and recording a transcript of the judgment rendered by the justice in the office of the clerk of the district court. *Hughes v. Cummings et al.*, 138.

4. The jurisdiction of a county court must, in a collateral proceeding, be tested by its own record. *Ib.*

5. In a proceeding under a statute affording a provisional remedy for a special purpose, the same principles must apply which are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of juris-

JURISDICTION — Continued.

diction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action. *The Denver, W. & P. R'y Co. v. Church*, 148.

6. In such case the costs *held* to be rightfully taxed against the party bringing the action in the county court when it might have been brought and determined in the district court, which had concurrent and unlimited jurisdiction in such cases. *Ib.*

7. In condemnation proceedings under the statute, in the county courts, such courts are without jurisdiction where the amount of the award is in excess of \$2,000. *The Denver & R. G. R'y Co. v. Otis et al.*, 198.

8. In pleading a judgment of a court of general jurisdiction it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign or one of a court of a sister state. If the court had no jurisdiction, that fact should be raised by defendant's plea. *Bruckman v. Taussig*, 561.

JURORS:

1. While a court may, upon its own motion, or upon the application of a juror, exercise its discretion in the matters of excuse or exemption, and if a juror be excused for an insufficient cause, it is not ground of reversal, yet the rule cannot be extended to a challenge for cause and judgment thereon. *Mooney v. The People*, 218.

2. Every person charged with a felonious crime is entitled to a list of the jurors comprising the regular panel previous to his arraignment. The prisoner has the right to object to the depletion of the regular panel on insufficient grounds. *Ib.*

JURY:

1. The supreme court will not consider errors not excepted to below. It is the province of the jury to determine the weight of testimony when conflicting. *Ralph v. Weary*, 217.

LANDLORD AND TENANT:

1. Section 1498 of the General Statutes, regarding the change in the terms of a lease, applies to tenancies from month to month, and not to a tenancy for one month. *Reithman v. Brandenburg*, 480.

2. A tenant of demised premises holding over is deemed in law to hold as tenant at the same rent previously paid, if there be no new agreement. But if he has notice from his landlord that, in case he retains possession, he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to such increased rental. *Ib.*

See NOTICE TO QUIT.

LEASES:

1. Section 1498 of the general statutes, regarding the change in the terms of a lease, applies to tenancies from month to month, and not to a tenancy for one month. *Reithman v. Brandenburg*, 480.

2. A tenant of demised premises holding over is deemed in law to hold as tenant at the same rent previously paid, if there be no new agreement. But if he has notice from his landlord that, in case he retains possession, he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to such increased rental. *Ib.*

LEGISLATION:

1. While the prevailing spirit of the constitution is opposed to special legislation, it is not, however, prohibitory of all special legislation, but only such as relates to certain specified subjects, and to such other cases where general laws are applicable. *Brown v. The City of Denver*, 805.

LEGISLATURE:

1. The legislature may, by statute, validate judicial proceedings where the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their substantial rights. But it cannot, by retrospective legislation, give vitality to previous judicial proceedings which were void for want of jurisdiction over the parties. *Israel v. Arthur et al.*, 5.

2. The legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, the court will look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited. *Alexander et al. v. The People*, 155.

3. When the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist. *Ib.*

4. The removal of county seats is a subject over which the law-making power has plenary jurisdiction and control. In the absence of constitutional restrictions, a removal could be authorized upon any vote, great or small, which that body deemed advisable. *Ib.*

LIEN:

1. The levy of a writ of attachment issuing out of a district court being followed by judgment, and execution having issued within a reasonable time, *held*, that the plaintiff's lien upon the attached property was preserved as against a special execution issuing out of a county court on a junior judgment in favor of another party; also *held*, that an objection that a general, instead of a special, execution was issued against the attached property would be unavailing. *Brown et al. v. Tucker*, 30.

2. Proceeding by attachment is in the nature of a proceeding *in rem*, and the attaching creditor acquires a specific lien upon the property attached. This lien cannot be destroyed, except by dissolution of the attachment or some default of the attaching creditor. *Emery v. Yount*, 107.

3. Such lien is not merged in the judgment rendered in the action, in aid of which the attachment was sued out, until the transcript of the judgment docket has been filed for record in the office of the recorder, since no judgment lien exists until that is done. *Ib.*

4. In case of such attachment lien, where conveyance was made subsequent thereto, an averment of insolvency is not necessary in suit to cancel the conveyance; for though the debtor may be abundantly able to satisfy the judgment, he will not be permitted by fraudulent conveyance to defeat or destroy the specific attachment lien of the creditor. The latter may invoke the aid of equity to remove the obstruction from the way of the enforcement of his lien, without resorting to an execution or other legal remedy. *Ib.*

LIMITATIONS:

1. Whether the promise, its identity with the debt being assumed or established, is sufficient to take a case out of the bar of the statute of limitations, is a question of law for the court. Whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury. *Morrell v. Ferrier*, 22.
2. As a general rule, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is on the defendant to show that it related to another debt either wholly or in part. *Ib.*
3. When a suit is upon a cause of action barred by time, and revived by a new promise, the action is upon the contract created by the new promise; and if such new promise be conditional, the plaintiff is not entitled to recover except upon the performance or happening of such condition, and the burden of proving the same rests upon him. *Richardson v. Bricker*, 58.
4. A promise to pay "when able" is conditional, and the happening of this condition is a question of fact for the jury. *Ib.*
5. The statute of limitations does not run against a creditor who is prevented by a superior law from bringing his action. *Brooks v. Bates et al.*, 576.

LOCATION:

1. Section 2324, Revised Statutes of the United States, appears to require, as prerequisites to a valid location of a mining claim, that the location be distinctly marked on the ground, so that its boundaries can be readily traced, and that such a record of the location be made as will identify the claim and disclose the names of the locators and the date of location. The provisions of this section refer to both lode and placer claims. *Sweet v. Webber et al.*, 443.
2. The act of congress of May 10, 1872, requires an annual expenditure of at least \$100 on all claims thereafter located. Neither a rule of miners nor a state law can authorize less without being in conflict with the law of congress, and therefore void. *Ib.*
3. The right to possession of a mining claim comes only from a valid location; if there is no location, there can be no possession under it. *Ib.*

LOCATION CERTIFICATE:

1. Where a location certificate appears to have been in compliance with the statute, a mistake by the recorder, the party complaining, not having been misled, cannot avail himself of the error. Where judgment is permitted to go by default every issuable fact in the complaint is admitted. *Weese et al. v. Barker et al.*, 178.
2. The objects and functions of an "additional" location certificate are peculiar; it differs from ordinary documentary muniments of title in that it is not a title, nor proof of title; nor does it constitute, or of itself establish, the possessory right in issue, and to which it relates. It is, when recorded, notice to the world of the facts required by statute to be therein set forth, and it is also one of the steps requisite, under the statute, to constitute a mining location. *Strepey et al. v. Stark et al.*, 614.
3. Four certain things are to be done in order to perfect a mining location: First, the sinking of a discovery shaft; second, the posting of a discovery notice; third, the marking of the surface boundaries of the claim; fourth, making and recording a location certificate. *Ib.*

LOCATION CERTIFICATE — Continued.

4. Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. And such certificate, when recorded, is competent evidence to show the date of location, the description of the premises, and that the statute requiring such certificate to be made out and recorded has been complied with. *Ib.*

5. The admissibility of an "additional" location certificate is not affected by the circumstance that it was filed subsequent to the commencement of the suit. It is not evidence of any after-acquired right or interest, but merely evidence relating to a right of possession which must have been acquired prior to the filing of such certificate, and prior to the acquisition of any intervening right of the adverse party. *Ib.*

LOT OWNERS: See DAMAGES, 5, 6, 7, 8, 9, 10.

MALICIOUS PROSECUTION:

1. In civil actions for injury resulting from torts, where the offense is punishable under the criminal laws, exemplary damages, as a punishment or example, cannot be awarded. *Quere*, whether the recovery in all cases should not be limited to a liberal rule of compensatory damages? *Murphy v. Hobbs*, 541.

2. In actions for malicious prosecution, malice may be implied or imputed from the absence of probable cause. *Ib.*

3. But affirmative evidence of language or acts on the part of the prosecutor, tending to show actual malice, are admissible in evidence when they are so closely connected with the transaction as to be part of the *res gestae*. *Ib.*

MANDAMUS:

1. A recorder is not compellable, by *mandamus*, to allow abstract makers to use his office and the county records for the purpose of abstracting the entire records of the land titles of the county for sale. *Bean v. The People*, 200.

MASTER AND SERVANT:

1. Where one is employed to serve for a definite term, as for a year, and is discharged before the expiration of the term without fault on his part, he has a right of recovery, either for the balance of wages due, or damages for the loss he may have suffered by reason of the wrongful discharge. *The Saxonia M. & R. Co. v. Cook*, 589.

2. In an action for a breach of contract, in such case, whether brought before or after the end of the term, the measure of damages is not the amount of wages stipulated in the contract for the entire term, but the actual loss, although the amount of the agreed wages may be taken as the measure of damages *prima facie*, or in the absence of any other showing. *Ib.*

3. In such case the plaintiff cannot recover the wages accruing for the balance of the term *as a matter of course*. He is bound to use reasonable efforts to secure labor elsewhere. If he secures labor, or by reasonable diligence might have done so, the amount received, or that might have been received, must be deducted from the amount of damages occasioned by the breach of the contract. *Ib.*

4. While the defendant may mitigate the damage to the extent of what the plaintiff might have earned from other parties during the term, the burden of establishing such mitigating facts is on the defendant. *Ib.*

MINING CLAIM:

1. Section 2324, Revised Statutes of the United States, appears to require, as prerequisites to a valid location of a mining claim, that the location be distinctly marked on the ground, so that its boundaries can be readily traced, and that such a record of the location be made as will identify the claim and disclose the names of the locators and the date of location. The provisions of this section refer to both lode and placer claims. *Sweet v. Webber et al.*, 448.

2. The act of congress of May 10, 1872, requires an annual expenditure of at least \$100 on all claims thereafter located. Neither a rule of miners nor a state law can authorize less without being in conflict with the law of congress, and therefore void. *Ib.*

3. The right to possession of a mining claim comes only from a valid location; if there is no location, there can be no possession under it. *Ib.*

MINING LOCATION:

1. The objects and functions of an "additional" location certificate are peculiar; it differs from ordinary documentary muniments of title in that it is not a title, nor proof of title; nor does it constitute, or of itself establish, the possessory right in issue, and to which it relates. It is, when recorded, notice to the world of the facts required by statute to be therein set forth, and it is also one of the steps requisite, under the statute, to constitute a mining location. *Strepey et al. v. Stark et al.*, 614.

2. Four certain things are to be done in order to perfect a mining location: First, the sinking of a discovery shaft; second, the posting of a discovery notice; third, the marking of the surface boundaries of the claim; fourth, making and recording a location certificate. *Ib.*

3. Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps therefor, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. And such certificate, when recorded, is competent evidence to show the date of location, the description of the premises, and that the statute requiring such certificate to be made out and recorded has been complied with. *Ib.*

4. Under location statutes, to constitute such possession as will give the locator a right to mineral lands before patent issues, neither residence on the premises, nor continuous actual occupation, nor that kind of possession denominated *possessio pedis*, is required. *Ib.*

MINING PARTNERSHIPS:

1. A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine, and may exist as well where the parties have an interest merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself. *Manville v. Parks et al.*, 128.

2. A partnership may be implied from the acts of the parties, as well as by express intent and agreement. *Ib.*

3. While the members of mining partnerships may not possess implied authority to bind the company by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines. *Ib.*

MINING PARTNERSHIPS — Continued.

4. The authority of each partner to bind the other is an implied one, and, as between the partners themselves, there may exist, by express agreement, a limitation upon the general implied authority; but third persons dealing with the firm, without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business. *Ib.*

MISJOINDER: See **PLEADING**, 16.

MISTAKE:

1. Where a location certificate appears to have been in compliance with the statute, a mistake by the recorder, the party complaining, not having been misled, cannot avail himself of the error. Where judgment is permitted to go by default every issuable fact in the complaint is admitted. *Weese et al. v. Barker et al.*, 179.

MONEY PAID ON ACCOUNTS:

1. The rule of law is that the debtor may direct, on paying money to his creditor, the appropriation of it to a particular account or item of indebtedness; but if he make or indicate no such appropriation, the creditor may apply the money as he pleases. When money is paid generally on an account, without any appropriation, the rule is that it should be applied to the first items in the account. *Mackey v. Fullerton et al.*, 556.

MUNICIPAL CORPORATIONS:

1. The general current of authorities supports the view that when municipal corporations are invested with the exclusive authority and control over streets and bridges, with power for raising money for their construction, improvement and repair, a duty arises to the public—whether expressly enjoined in the charter or not—from the nature of the powers granted, to keep them in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon such corporations to respond in damages to those injured by a neglect to perform the duty. Such duty is municipal or ministerial, and not governmental or discretionary. *Daniels et al. v. City of Denver*, 2 Col. 669, distinguished. *City of Denver v. Dunsmore*, 828.

2. A corporate existence and validity of the acts of a *de facto* corporation whose user is established cannot be attacked collaterally upon the ground of an irregularity or omission in its certificate of incorporation. *City of Denver v. Mullen et al.*, 345.

3. A municipal corporation which accepts the dedication of streets, across which a ditch has been previously located and right of way therefor acquired, takes the same subject to the prior rights of the owners of the ditch. And when the necessities of the public require that such ditch be bridged at the street crossings, it is the duty of the city, and not the owner of the ditch, to construct such bridges. *Ib.*

4. A special charter granted to a municipal corporation before the adoption of the constitution is not abrogated by that instrument unless in conflict therewith. *The People ex rel. Mills v. Jobb*, 475.

5. The office of police judge, with jurisdiction to enforce town ordinances, is authorized by section 1, article VI, of the constitution. *Ib.*

6. The unconstitutionality of one part of a statute does not necessarily render the whole of the statute void. *Ib.*

MURDER:

1. *Habeas corpus* will lie when the petitioner is confined under the judgment of a court, to enter which the court had not jurisdiction—as in case of a judgment not based on a valid verdict of conviction. *Garvey's Case*, 384.

2. Certain crimes, including murder, are arranged in grades, one above another, and each higher offense or grade of an offense contains all that is embraced in the one next lower, and something more. It is not necessary that an indictment for any offense shall specify the name of the offense, provided it is in all other respects sufficient. In this class of crimes, whatever the offense alleged in the indictment, there may be a conviction of any other if within the words of the allegation;—an indictment for murder charges also all the lower grades of felonious homicide, and a conviction for manslaughter may be had upon it. *Ib.*

3. An indictment for murder was found by the grand jury. Subsequently an act of the legislature was passed without a saving clause, which rendered it illegal to convict the accused of the crime of murder, but did not affect the law as to the punishment for manslaughter. *Held*, that the accused, under that indictment, might be tried for the latter offense. *Ib.*

4. In such case, the fact that the accused has been tried under said indictment, convicted of murder, and judgment pronounced upon the verdict, which judgment was reversed because of error in entering the same—the law having been so modified as to forbid the judgment,—will not warrant his discharge on the ground of former jeopardy when subsequently tried for manslaughter on the same indictment. *Ib.*

5. The verdict is the foundation of the judgment, and when the latter is reversed because the law did not authorize the former, both are set aside and are of no effect;—judgment for murder being reversed and the cause remanded for further proceedings, the court cannot, upon such verdict for murder, enter judgment for manslaughter without a retrial of the cause. One so convicted may be released from the penitentiary on *habeas corpus*, and remanded to the custody of the sheriff to await trial. *Ib.*

NEGLIGENCE:

1. It being the custom to require valuable packages to be sealed before receiving for shipment, it is negligence to receive an unsealed package, or to ship it unsealed. Nor can the company, so in default, be excused by the fact that the loss may have occurred on one of the subsequent connecting lines. *The Overland M. & E. Co. v. Carroll*, 43.

2. Where a complaint alleges that the obstruction on the track, which caused the injury complained of, was on the track by negligence of the company, and that deceased was, at the time, in the discharge of his duty, exercising due care and skill, a demurrer will not lie. *Wilson et al. v. D., S. P. & P. R. R. Co.*, 101.

3. If the plaintiff, in his own case, shows that he brought the injury upon himself, he may be nonsuited. But if the defendant's failure of duty and the injury to the plaintiff are shown, and it does not appear that the plaintiff brought on the injury by his own negligence, such proof must come from the defendant. *City of Denver v. Dunsmore*, 328.

4. When the measure of duty is ordinary and reasonable care, the question of negligence is one for the jury to determine. When the plaintiff has made a *prima facie* case, the court will not take it from the jury. *Ib.*

NEGLIGENCE — Continued.

5. It is a well settled rule, upon the subject of negligence, that when the plaintiff so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover. *Colorado Central R. R. Co. v. Martin*, 502.

6. Cases frequently arise wherein it becomes the duty of the trial court to determine the question of the negligence of the party as a matter of law. But where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury. *Ib.*

7. To warrant the court in instructing the jury that a party was guilty of negligence, the case must be such as to allow no other inference from the evidence. *Ib.*

NEGOTIABLE INSTRUMENTS:

1. Time checks are assignable obligations, and need not be accepted. *The Rio Grande Extension Co. v. Coby*, 299.

2. In an action upon such "time checks," it is necessary to offer some proof of the agency of the person by whom they were made, unless there is a waiver of the same. Otherwise nonsuit should be allowed. *Ib.*

NEW PROMISE:

1. Whether the promise, its identity with the debt being assumed or established, is sufficient to take a case out of the bar of the statute of limitations, is a question of law for the court. Whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury. *Morrell v. Ferrier*, 22.

2. As a general rule, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is on the defendant to show that it related to another debt either wholly or in part. *Ib.*

3. When a suit is upon a cause of action barred by time, and revived by a new promise, the action is upon the contract created by the new promise; and if such new promise be conditional, the plaintiff is not entitled to recover except upon the performance or happening of such condition, and the burden of proving the same rests upon him. *Richardson v. Bricker*, 58.

4. A promise to pay "when able" is conditional, and the happening of this condition is a question of fact for the jury. *Ib.*

NOTICE:

1. Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. *Brown v. The City of Denver*, 305.

2. In the absence of proof of actual notice, a mortgagee under a chattel mortgage, with insufficient description, and not recorded in the county in which the personal property is found in the possession of the mortgagor, may not defeat the rights of a purchaser thereof at judicial sale. *Tabor v. Sampson*, 426.

NOTICE TO QUIT:

1. Where a tenant occupied premises for several years, and then entered into a lease for one year certain, *held*, under the facts in this case, that his former occupancy did not inure to his benefit and constitute him a tenant from year to year, upon his holding over after the expiration of his lease, and so entitle him to three months' notice to quit, under the statute. *Brandenburg v. Reithman*, 323.

NUISANCE:

1. A provision in the charter of a city conferring authority on the council "to make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and prevent and abate the same," will warrant the declaration by general ordinance of what shall constitute, and the conditions and circumstances under which a given thing shall become and be deemed a nuisance, but does not authorize the council, by mere resolution or motion, arbitrarily to declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. *City of Denver v. Mullen et al.*, 345.

2. Only those nuisances may be abated summarily which affect the health or interfere with the safety of property or person, or are tangible obstructions to streets and highways, under circumstances presenting an emergency, etc.,—such as are clear cases of nuisance *per se*. In other cases, judicial determination is necessary before a thing can be abated as a nuisance, either by the public or a private person. *Ib.*

3. A nuisance which is exclusively common or public cannot lawfully be abated at the suit of private individuals; the remedy is by indictment or criminal prosecution, unless other remedy has been provided by statute. A private nuisance may be abated by the party aggrieved; a nuisance which is both public and private may be proceeded against either by the public, or by the private individual affected thereby. In case of private nuisance, the aggrieved party may elect to abate the same, or have his action for damages. A civil action by the proper officers, on behalf of the public, will also lie to abate a public nuisance. *Ib.*

4. Almost every case involving the question of nuisance in the use of property is to be determined in view of its own circumstances, and, as a general rule, the relative rights of the parties control—the question being, whether or not the use of the property in the manner complained of is reasonable, and in accordance with such relative rights. What constitutes a nuisance is a question of law for the courts; whether the results of a given business are so common as to amount to a public nuisance, is a question of fact for the jury; as is the question, whether a particular use—not a misuse *per se*—is an unreasonable use and a nuisance. *Ib.*

OBLIGATIONS:

1. Obligation, as employed in section 1834 of the General Statutes, and section 14 of the code (section 13, Code of 1883), does not embrace or apply to oral contracts. *Exchange Bank v. Ford et al.*, 314.

OFFICE:

1. Where an office was recognized under the organic act of the territory, and where the same office is recognized under the state constitution, it is a matter of no consequence that the existence thereof under the former instrument was by virtue of certain pow-

OFFICE — *Continued.*

ers conferred upon justices of the peace, while under the latter its validity depends upon a provision relating to judicial officers for cities and towns. *People ex rel. v. Jobs*, 589.

2. A comparison of section 2 of the statute establishing the State Industrial School with section 6 of article 4 of the constitution, shows that while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate. *The People ex rel. v. Osborn*, 605.

3. There being no constitutional restrictions imposed, it is competent for the legislature to provide the manner of making original appointments, the terms of office, how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. *Ib.*

4. The word vacancy has no technical or peculiar meaning, as used in the statute (Laws 1881, p. 133, sec. 2); it means empty and unoccupied, as applied to an office without an incumbent. An office is not vacant while any person is authorized to act in it, and does so act. *Ib.*

ORDINANCES:

1. A valid assessment cannot be made under an invalid ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions. *Brown v. The City of Denver*, 805.

See DAMAGES, 5, 6, 7, 8, 9, 10.

PARTNERS:

1. While the members of mining partnerships may not possess implied authority to bind the company by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines. *Manville v. Parks et al.*, 128.

2. The authority of each partner to bind the other is an implied one, and, as between the partners themselves, there may exist, by express agreement, a limitation upon the general implied authority; but third persons dealing with the firm, without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business. *Ib.*

3. The surviving partner of an insolvent firm may make an equitable and just assignment of the partnership effects for the equal benefit of all the firm creditors; but, in his position as trustee, he is not permitted to make an assignment and give preference therein to certain creditors. *Salsbury v. Ellison*, 167.

4. As a rule, when acting in furtherance of the objects and business of the firm and within the scope of its business, one partner is clothed with full powers of all the partners, and is authorized to bind the firm in all transactions. This power and authority is based upon the principle of agency. But one partner cannot, against the opposition of another, make a general assignment for the benefit of a portion of the firm creditors, when such creditors, or their agent, have notice of such opposition. *Wilcox et al. v. Jackson*, 531.

PARTNERSHIP:

1. A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine, and may exist as well where the parties have an interest merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself. *Manville v. Parks et al.*, 128.

2. A partnership may be implied from the acts of the parties, as well as by express intent and agreement. *Ib.*

3. While the members of mining partnerships may not possess implied authority to bind the company by a promissory note, or for money borrowed to carry on the business, yet, as an incident of such partnership, they have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines. *Ib.*

4. The authority of each partner to bind the other is an implied one, and, as between the partners themselves, there may exist, by express agreement, a limitation upon the general implied authority; but third persons dealing with the firm, without notice of such restrictions, are not affected thereby with respect to dealings within the scope of the partnership business. *Ib.*

5. To maintain an action at law for the balance found due upon a settlement of partnership accounts, an averment in the complaint of the settlement is essential, and without such averment the pleading is fatally defective. *Bean v. Gregg*, 499.

PARTNERSHIP DEBTS:

1. The equitable doctrine that partnership debts are joint and several, does not obtain in a purely legal action. *Exchange Bank v. Ford et al.*, 314.

PARTIES TO ACTIONS:

1. A demurrer for misjoinder of parties must, under the code, state specifically in what the misjoinder consists. *Irwine et al. v. Wood et al.*, 477.

2. Upon a contract expressing a several liability of the defendants, they may, under the code, be joined in an action thereon. This construction is in accord with the reform spirit and express purpose of the code practice. *Ib.*

See EQUITY, 2.

PARTY IN INTEREST:

1. The assignee of a note and account sued upon must be deemed "the real party in interest," under the code, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee. *Bassett v. Inman*, 270.

See DEED, 5.

PATENT:

1. The government does not part with title to the public domain until the issue of a patent therefor; however, when such patent has issued, the title conveyed thereby is held to relate back to the date of the entry, as evidenced by the certificate thereof, but will not relate back to an act of congress authorizing the entry merely. *City of Denver v. Mullen et al.*, 345.

2. A patent which is not void on its face for fraud or irregularity in procuring the same can only be impeached therefor in a direct proceeding to set it aside. *Wells v. Francis et al.*, 896.

PATENT — Continued.

3. If a patent on its face shows that it is issued under and in pursuance of certain acts of congress, and it is true that such acts were repealed prior to the application therefor, the patent is void, and may be impeached in a court of law. *Schwenke v. Union D. & R. R. Co.*, 512.

4. An act of congress containing no words of present grant does not of itself operate as a conveyance of the legal title to land. *Ib.*

PLACE OF TRIAL:

1. Under section 28 of the code, action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides. *Bean v. Gregg*, 499.

PLEADING:

1. A rule applicable to every system of pleading is that a demurrer runs through the whole series of pleadings, and will be sustained to the first defective pleading. Objections are not waived to an answer by filing a demurrer to a replication. *Brown et al. v. Tucker*, 80.

2. The code requires that the defendant's answer shall contain a specific denial to each allegation in the complaint intended to be controverted, and every material allegation not controverted shall, for the purposes of the action, be taken as true; therefore, *held*, that an averment of value of goods and damages for their detention, in the complaint, in an action of replevin, are material allegations, and a failure to deny them is to admit them to be true. *Tucker v. Purks*, 62.

3. It is a familiar rule that evidence cannot be given of facts not alleged in the pleadings, and that neither admissions nor stipulations can make a case broader than it is by allegation. Neither can a party have relief beyond what the averments of his pleadings entitle him. *Ib.*

4. When it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the damages must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise at the trial. *Ib.*

5. Fraud must be specially pleaded in an answer as well as in a complaint. *Ib.*

6. There is no such thing as a general denial in pleading under the code; a specific denial is required to each and every allegation in the complaint intended to be controverted. In an action on a promissory note it is proper to plead the want of consideration by specific averment, and in such case an issue is formed without a reply. *Alden v. Carpenter*, 87.

7. Where a complaint alleges that the obstruction on the track, which caused the injury complained of, was on the track by negligence of the company, and that deceased was, at the time, in the discharge of his duty, exercising due care and skill, a demurrer will not lie. *Wilson et al. v. D., S. P. & P. R. R. Co.*, 101.

8. A court of equity will not interfere to set aside a conveyance on the ground of fraud, at the suit of a general judgment creditor, where the debtor has other property subject to execution; and, in such case, a bill which fails by proper averment to allege insolvency, or facts sufficient to indicate that the judgment cannot be collected without equitable aid, is fatally defective; and the defect is not cured by evidence of insolvency. *Emery v. Yount*, 107.

PLEADING — Continued.

9. Before a court of equity is authorized to cancel a voluntary conveyance on the ground of fraud upon the creditors of the grantor, it must be alleged and proved that debts existed at the time the conveyance was made, or that it was executed with a view to the creation of future obligations. *Ib.*

10. In such case the question, going to the sufficiency of the facts alleged to constitute a cause of action, can be raised at any time. *Ib.*

11. In case of attachment lien, where conveyance was made subsequent thereto, an averment of insolvency is not necessary in suit to cancel the conveyance; for though the debtor may be abundantly able to satisfy the judgment, he will not be permitted by fraudulent conveyance to defeat or destroy the specific attachment lien of the creditor. The latter may invoke the aid of equity to remove the obstruction from the way of the enforcement of his lien, without resorting to an execution or other legal remedy. *Ib.*

12. Under the practice in this state an equitable defense may be made in a legal action; and, therefore, the defense that an assignment by a surviving partner is fraudulent and void as against an unpreferred creditor may be interposed in a legal forum; and although such defense be not averred in the pleadings, yet if plaintiff establishes the same in making out his case, the objection that it is not pleaded in the answer will be considered as waived, and defendant may have the benefit thereof. *Salsbury v. Ellison*, 167.

13. When parties are made plaintiffs to an amended complaint the presumption obtains that all consented thereto, otherwise those not consenting would have been joined as defendants under the code. Sections 11, 13. *Weese et al. v. Barker et al.*, 178.

14. The statute of frauds has changed the rule of evidence, not the rule of pleading. A plea which set forth a contract for the conveyance of real estate is good on demurrer, though it does not aver that the contract was in writing — it not appearing in the plea that it was not in writing. *Tucker v. Edwards*, 209.

15. Under the old practice, while the parts of each plea could not be repugnant to each other, still separate special pleas might be inconsistent, yet not render the pleadings obnoxious to demurrer. *Ib.*

16. The failure to make the accord a full satisfaction, being the fault of plaintiff, defendant was not, in this case, precluded from the benefit of this defense. *Ib.*

17. A defendant does not waive his objection to the ruling on demurrer to his plea of accord and satisfaction by going to trial on the plea of *nul tiel* record. *Ib.*

18. Misjoinder of causes of action is ground for demurrer, and unless so taken advantage of cannot be made available in this court; and even if raised by demurrer, the objection is waived by answering over. *Green v. Taney*, 278.

19. In an action to cancel and set aside a deed of record, on the ground that it was never delivered, and its possession procured by the grantee by fraud — the grantee being dead, his heirs are necessary parties. A complaint against the executrix only, held bad on demurrer. *Snyder v. Voorhies*, 296.

20. The code abolishes forms of action merely, and provides a single method of pleading. It does not undertake to do away with the distinction between legal and equitable causes of action. It is still the general rule that equitable relief cannot be secured unless an equitable cause of action or defense appear in the pleadings. *Exchange Bank v. Ford et al.*, 314.

PLEADING — *Continued.*

21. Under an *indebitatus* count properly stated, under the old system of practice, plaintiff might recover the amount due him without a *quantum meruit* count, although no specific sum was agreed upon. But the code abolishes these distinctions in the forms of action, and only requires that the complaint state, in concise language, the ultimate facts constituting the alleged cause of action. *Leitensdorfer v. King*, 436.

22. A demurrer for misjoinder of parties must, under the code, state specifically in what the misjoinder consists. *Irwine et al. v. Wood et al.*, 477.

23. Upon a contract expressing a several liability of the defendants, they may, under the code, be joined in an action thereon. This construction is in accord with the reform spirit and express purpose of the code practice. *Ib.*

24. The connected structure of a pleading cannot be destroyed or disjoined at the pleasure of the pleader, and its disconnected averments separately demurred to. *Herfort v. Cramer*, 483.

25. A pleading, to be subject to demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say — taking all the facts to be admitted — that they furnish no cause of action whatever. *Ib.*

26. A defective averment may sometimes be cured by verdict; but the entire absence of a material averment is fatal to a recovery. *Bean v. Gregg*, 499.

27. Where a complaint failed to state sufficient facts to show wherein the refusal of defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass or detention, *held* bad on demurrer. *Brandenburg v. Miles*, 537.

28. In pleading a judgment of a court of general jurisdiction it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign or one of a court of a sister state. If the court had no jurisdiction, that fact should be raised by defendant's plea. *Bruckman v. Taussig*, 561.

29. Interest may be recovered on a judgment of the court of another state without any averment in the complaint that it is allowed by the statute of the state in which it was recovered. *Ib.*

30. In pleading, ultimate and not evidential facts must be stated. A breach must be stated, or there is no cause of action shown. The essential facts must be stated in unequivocal language, and not left to be inferred. The plaintiff is not at liberty to make out his case by proving facts not alleged in his complaint. *Saxonia M. & R. Co. v. Cook*, 569.

31. In a complaint it is not proper to anticipate a defense, and, upon motion to strike out, such matters should be rejected. *Brooks v. Bates et al.*, 576.

32. Where a plaintiff, for the purpose of avoiding defendant's plea of the statute of limitations, avers in his replication the pendency of voluntary proceedings under the bankrupt law by the defendant, the claim sued upon being a provable one in the bankruptcy court, it further devolves upon plaintiff to also sufficiently aver that the same has not been proved therein. *Ib.*

33. In an action by an assignee of a judgment, an averment of the assignment of the judgment is necessary, and a denial of the averment necessarily presents a material issue. *Hughes v. Brewer*, 533.

PLEADING — Continued.

84. The defendant has the right to controvert and put in issue every material averment of the complaint. This is to be done by means of specific denials, and such denials may be made upon information and belief, when the facts are not presumptively within the defendant's knowledge. *Ib.*

85. Whether an assignment of a judgment is *bona fide*, and the plaintiff the owner of the judgment at the time of action brought, are facts presumptively within the knowledge of the plaintiff, but not presumptively within the knowledge of the defendant. *Ib.*

86. There is nothing in the statute requiring the jurisdictional averment to be in a prescribed form in an action in a county court. The requirements of the statute are satisfied by averments in the complaint which are equivalent to an allegation that the amount in controversy does not exceed \$2,000. *Ib.*

POLICE JUDGE: See MUNICIPAL CORPORATIONS, 4, 5, 6.

POSSESSION:

1. Where property is found by the officer in the actual custody of the person named in his execution, the levy thereon gives the officer lawful possession; and in such case a demand is an essential prerequisite to suit in replevin against the officer. But when the property is found in custody of a stranger to the writ, the officer's possession under his levy is wrongful and no demand is necessary. *Stone v. O'Brien*, 458.

2. Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible. *Ib.*

POSSESSORY ACTIONS:

1. The rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary, is *held* not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but where the prior possession of the plaintiff is pitted against the present possession of the defendant. *Strepey et al. v. Stark et al.*, 614.

2. Under location statutes, to constitute such possession as will give the locator a right to mineral lands before patent issues, neither residence on the premises, nor continuous actual occupation, nor that kind of possession denominated *possessio pedis*, is required. *Ib.*

PRACTICE:

1. Whether the promise, its identity with the debt being assumed or established, is sufficient to take a case out of the bar of the statute of limitations, is a question of law for the court. Whether the words of acknowledgment or promise, when not expressly referring to the debt sought to be recovered, are to be deemed as referring to such debt, is usually a question of fact for the jury. *Morrell v. Ferrier*, 22.

PRACTICE — *Continued.*

2. It is error to allow an answer to a hypothetical question which does not conform to the facts in evidence. *Wells et al. v. Adams*, 26.

3. Under the code (1877, secs. 431, 443), a judge who, before he went upon the bench, was of counsel in a case, is disqualified from presiding at the trial unless all parties consent that he may. And in such case it is his imperative duty (if county judge), of his own motion or on suggestion, to certify the case to the district court, without requiring petition for change of venue under the statute. *O'Connell v. Gavett*, 40.

4. The well-settled rule of law relating to all irregularities in the proceedings of arbitrators, which are not jurisdictional, is that an objection, to be availing, must be seasonably made. If a party, knowing of an irregularity, in order to avail himself of all chances of an award in his favor, remains silent, and permits the investigation to proceed, and money to be expended, etc., he will not afterwards be heard to question the validity of an unfavorable award, on the ground of such irregularity. *The Glass-Pendery C. M. Co. v. Meyer M. Co.*, 51.

5. The failure of one of a board of arbitrators to attend a meeting, when no final action was taken, was a mere irregularity, and not jurisdictional, it appearing that all the arbitrators were present at the last meeting, and all, with the whole evidence before them, consulted and deliberated together concerning their award. *Ib.*

6. A party is estopped from taking advantage of an error in the order of introducing evidence, for which error he himself is responsible. *Richardson v. Bricker*, 58.

7. Under the code (section 141, Code of 1833) suit may be brought upon an injunction bond in the first instance against the principal and sureties, and the damages assessed and awarded in such action. *Docket et al. v. Price et al.*, 84.

8. Where a defendant filed an affidavit in support of a motion for continuance on the ground of the absence of a witness, and the plaintiff offered to admit that the witness, if present, would swear to what was stated in the affidavit, and the motion being denied, *held*, not error. *Alden v. Carpenter*, 87.

9. Admitting the testimony of an absent witness in order to avoid a continuance is not to be taken as an admission of the truth of such testimony; nor does such admission preclude the party admitting it from rebutting the same on trial. *Ib.*

10. A mere irregularity in the order of proceeding in the trial court, and which could not have prejudiced the appellant, is not assignable for error. *Ib.*

11. Objection on the ground of variance between the complaint and the proof comes too late when made for the first time in the supreme court. *Smith v. Roe*, 95.

12. The taking a default against a defendant upon failure to plead is a privilege of the plaintiff, and, if he chooses to waive it previous to trial, it is not a matter of which the party in default can complain. *Manville v. Parks et al.*, 123.

13. Under section 75 of the code, a county court may reinstate a cause after the expiration of the term at which it was dismissed, and a district court has no power, in a collateral proceeding, to pass upon the validity of an order made by the county judge reinstating a cause upon the docket of the county court. *Hughes v. Cummings et al.*, 138.

14. In a proceeding under a statute affording a provisional remedy for a special purpose, the same principles must apply which

PRACTICE — *Continued.*

are applicable to ordinary actions where the court has judicially ascertained that it is without jurisdiction of the subject-matter of the action. In such case, whether there is disclosed a want of jurisdiction *ab initio*, or whether the matter made to appear operates as a divestiture of a jurisdiction rightfully acquired or assumed in the beginning, it is the duty of the court to dismiss the action. *The Denver, W. & P. Ry Co. v. Church*, 143.

15. In such case the costs *held* to be rightfully taxed against the party bringing the action in the county court when it might have been brought and determined in the district court, which had concurrent and unlimited jurisdiction in such cases. *Ib.*

16. Where an amount is acknowledged in the pleadings to be due plaintiff, it is error to find a verdict or render a judgment for a less amount than that admitted by the pleadings. *Coffman et al. v. Brown*, 147.

17. It is not error to permit an answer to be filed after the statutory period for answering has expired — no default having been entered. *Quære*, whether the code renders it necessary in such case to obtain leave of the court to file answer. *Sieber et al. v. Frink et al.*, 148.

18. In purely equitable cases, the trial must be to the court, unless both parties consent to a trial by a jury. Neither the chapter on references, nor any other provision of the code, operates to deprive the court of the right, in such cases, to direct, upon its own motion, the taking and reporting of the evidence by a referee. The trial may be upon proofs thus taken, or upon testimony given in open court. *Ib.*

19. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed. It is not essential that this be done in term time. *Ib.*

20. Where a cause is tried to the court upon proofs taken by a referee or master, it is the duty of the supreme court to sift and weigh all the evidence, with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses, and the judgment will be reversed if not supported by the weight of evidence. *Ib.*

21. Under the practice in this state an equitable defense may be made in a legal action; and, therefore, the defense that an assignment is fraudulent and void as against an unpreferred creditor may be interposed in a legal forum. *Salsbury v. Ellison*, 167.

22. Although such defense be not averred in the pleadings, yet if plaintiff establishes the same in making out his case, the objection that it is not pleaded in the answer will be considered as waived, and defendant may have the benefit thereof. *Ib.*

23. When parties are made plaintiffs to an amended complaint the presumption obtains that all consented thereto, otherwise those not consenting would have been joined as defendants under the code. Sections 11, 13. *Weese et al. v. Barker et al.*, 178.

24. If a judgment entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final it must end the particular suit in which it is entered. *Dusing v. Nelson*, 184.

25. Where, on error to a county court, the record shows that testimony was produced on the trial in support of the complaint, but has not been preserved, and the finding and judgment having been.

PRACTICE — Continued.

for the plaintiff, the presumption obtains that the allegations of fact on part of the plaintiff were duly proven. *Ib.*

26. The unsworn declarations of parties touching their qualifications as voters, after the election, and who were not present at the trial to contradict or explain such declarations, *held* to have been properly excluded as mere hearsay. *People ex rel. v. Commissioners of Grand Co.*, 190.

27. It is within the discretion of the court to refuse an attachment for a witness, who, after being subpoenaed, refuses to attend and testify; and the refusal of the court to issue an attachment will not warrant this court in reversing the finding, in the absence from the record of what it was expected to prove by such witness. *Ib.*

28. Parties have the undoubted right to submit, by agreement, any issues of fact, equitable or legal, to a jury for determination, and having done so, they will not afterwards be heard to complain. *Green v. Taney*, 278.

29. Except in certain specified cases, the court has no power to vacate a judgment after the term at which it was rendered. *Exchange Bank v. Ford et al.*, 314.

30. The court, in furtherance of justice, may, in its discretion, allow the usual order of introducing testimony to be departed from. When the defense relies upon expert testimony, it is entitled to put it in after all the evidence bearing on the question offered by plaintiff. And if the court allows plaintiff to vary the state of facts after the expert testimony has been heard, the expert witnesses may be recalled. If no offer to recall them be made, the case will not be reversed. *City of Denver v. Dunsmore*, 328.

31. A liberal construction must be given to the provisions of the Civil Code, to the end that the legislative intent may be made effectual. Under section 116, the proceeds of attached property may be prorated between the creditors therein specified — the words "returned to the same term of the court to which they are returnable," being interpreted to mean and apply to all writs of attachment which are in fact returned to at or during the same term of the court, at or during which they may be properly returned, after service according to law. *Daniels et al. v. Lewis et al.*, 430.

32. Under an *indebitatus* count properly stated, under the old system of practice, plaintiff might recover the amount due him without a *quantum meruit* count, although no specific sum was agreed upon. But the code abolishes these distinctions in the forms of action, and only requires that the complaint state, in concise language, the ultimate facts constituting the alleged cause of action. *Leitensdorfer v. King*, 436.

33. Upon a contract expressing a several liability of the defendants, they may, under the code, be joined in an action thereon. This construction is in accord with the reform spirit and express purpose of the code practice. *Irvine et al. v. Wood et al.*, 477.

34. A separate judgment may be proper, and may, in some cases, be necessary, whenever a several suit might have been brought. *Ib.*

35. Under section 28 of the code, action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides. *Bean v. Gregg*, 499.

36. The code (1883, section 387) provides that printed copies in volumes of statutes, or other written law of any other state or territory or foreign government, purporting or proven to have been

PRACTICE — Continued.

published by the authority thereof, shall be admitted by courts on all occasions as presumptive evidence of such laws. *Bruckman v. Taussig*, 561.

37. In Colorado there are two different proceedings by *certiorari*: One to review the action of an inferior tribunal, board or officer; the other to secure the trial *de novo* of causes previously heard by justices of the peace. *Small et al. v. Bischelberger*, 563.

38. Where the plaintiff, in action pending before a justice of the peace, agrees, for a valuable consideration, to dismiss the action, and the defendant performs his part of the contract, but the plaintiff, in violation thereof, proceeds to judgment without defendant's knowledge, and purposely withholds execution and levy until the time for appeal has expired, the defendant may have his remedy by *certiorari*. *Ib.*

39. Upon motion to quash the writ of *certiorari* the averments thereof are admitted as in case of demurrer. *Ib.*

40. Under the statute, no issue can be made or tried as to the truthfulness of those averments in the petition which give the court jurisdiction, through the proceeding by *certiorari*, to try the cause *de novo*; the respondent's rights seem, in this particular, to be protected by the bond required of the petitioner, and the liability of the latter to prosecution for perjury if these averments are knowingly false. *Ib.*

41. The court in bankruptcy may, under the statute, upon application of the bankrupt, restrain proceedings of a creditor in the state court, upon a provable claim, where there has been no unreasonable delay by the bankrupt in procuring his discharge. But if the bankrupt neglects to invoke the aid of the bankruptcy court in that way, no valid objection exists to the state court adjudicating the question when properly presented therein. *Brooks v. Bates et al.*, 576.

42. A referee was directed to try the issues presented and report findings upon the law and facts; exceptions were reserved and subsequently overruled, and judgment entered by the court on the referee's report; but no exceptions being reserved either to the ruling upon the issues presented by the report and the exceptions thereto nor to the final judgment rendered by the court, *held* that this court is precluded from reviewing the judgment on the evidence. *Poire v. Rocky Mountain T. Co.*, 588.

43. Cases frequently arise wherein it becomes the duty of the trial court to determine the question of the negligence of the party as a matter of law. But where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury. *Colorado Cent. R. R. Co. v. Martin*, 592.

44. To warrant the court in instructing the jury that a party was guilty of negligence, the case must be such as to allow no other inference from the evidence. *Ib.*

45. Error cannot be maintained upon the refusal of the court to give an instruction not applicable to the case made by the evidence. *De Walt v. Hartzell et al.*, 601.

46. Under section 74 of the code, as amended, upon the overruling of a demurrer to a complaint during term, the court shall, by order, fix the time to answer. *Ib.*

47. In a petition for change of venue, either in respect to the prejudice of the judge or the inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. *Ib.*

PRACTICE IN CRIMINAL CASES:

1. While a court may, upon its own motion, or upon the application of a juror, exercise its discretion in the matters of excuse or exemption, and if a juror be excused for an insufficient cause, it is not ground of reversal, yet the rule cannot be extended to a challenge for cause and judgment thereon. *Mooney v. The People*, 218.

2. Every person charged with a felonious crime is entitled to a list of the jurors comprising the regular panel previous to his arraignment. The prisoner has the right to object to the depletion of the regular panel on insufficient grounds. *Ib.*

3. An indictment which charges that "K. * * * and one Martha E. did then and there unlawfully live together in an open state of fornication," is good. *King v. The People*, 224.

4. Evidence, uncontradicted, that "K. told me, after the indictment was found, that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than other men who went to the row and slept with other women," is sufficient to justify the court and jury to conclude the "overt act" was committed. *Ib.*

5. An indictment for a statutory offense is sufficient which charges the offense in the language of the statute, or so plainly that the nature of the offense can be easily understood by the jury. *Cohen v. The People*, 275.

6. Upon the trial of one indicted for forgery it is not error to admit evidence tending to prove that the defendant uttered or passed the forged instrument. *Ib.*

7. The statute makes the offense of forgery to consist in the forging or counterfeiting the handwriting of another with the intent to damage or defraud some person. *Ib.*

8. The justices of the supreme court, acting singly out of term, are without jurisdiction to issue writs of *habeas corpus*, or to hear and determine matters arising thereon, notwithstanding the authority attempted to be conferred by the statute on *habeas corpus*. *In re Garvey*, 502.

9. The proceeding by *habeas corpus* is the proper remedy, under the statute of this state, to protect the right of persons charged with the higher class of crimes to a speedy trial, according to law. *Ib.*

10. In this case there were four successive terms of the district court, and one of the criminal court, to which the case had been transferred, at each of which the court had jurisdiction; at any one of the terms the petitioner might have been tried, but was not; the failure to try did not happen on the petitioner's application, he being in custody the entire time. *Held*, under the General Statutes (section 1616), upon which the petition is based, that the petitioner be discharged. *Ib.*

PRACTICE IN THE SUPREME COURT:

1. Where a transcript does not purport to give all the instructions given on behalf of either party, and the appellant admits that other instructions were given, the supreme court cannot be advised that the refused instructions contain any correct proposition of law, applicable to the case, which was not given to the jury. For the same reason the form of a judgment being omitted from the transcript, objection to it will not be considered. *Tucker v. Parks*, 62.

2. In an adjudication by a referee, under the statute as to priority of water rights, the decree may be modified for error of the referee in his judgment upon the weight of the testimony. *Dorr v. Hammond*, 79.

PRACTICE IN THE SUPREME COURT—*Continued.*

8. A mere irregularity in the order of proceeding in the trial court, and which could not have prejudiced the appellant, is not assignable for error. *Alden v. Carpenter*, 87.

4. Objection on the ground of variance between the complaint and the proof comes too late when made for the first time in the supreme court. *Smith v. Roe*, 95.

5. Where a cause is tried to the court upon proofs taken by a referee or master, it is the duty of the supreme court to sift and weigh all the evidence, with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses, and the judgment will be reversed if not supported by the weight of evidence. *Sieber et al. v. Frink et al.*, 148.

6. A judgment will not be reversed for errors which could not have prejudiced the appellant. *De Lappe v. Sullivan*, 182.

7. Matters may occur subsequent to judgment which operate to waive the right to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in error. *Atkinson et al. v. Tabor et al.*, 196.

8. Where the parties to be affected adversely by the relief sought, on error to the supreme court, are not before the court, the supreme court will not review the rulings and judgment of the court below. *Chapman et al. v. Pockock et al.*, 204.

9. The supreme court will not review questions not properly raised by specific assignment of error. *Kiskadden v. Allen*, 206.

10. The supreme court will not consider errors not excepted to below. It is the province of the jury to determine the weight of testimony when conflicting. *Ralph v. Weary*, 217.

11. Where the plaintiff failed to present in the court below the fact that a part of the debt in suit was the purchase price for the property attached, as against the statutory exemption claimed, he cannot raise it for the first time in the supreme court. *Bassett v. Inman*, 270.

12. The supreme court will only interfere with the finding of a jury on the evidence, when, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties. *Green v. Taney*, 278.

13. The supreme court may reverse, and direct what judgment shall be entered in the court below. *Tucker v. Parks*, 298.

14. When there is no substantial conflict in the evidence as to a material fact, and the jury find contrary thereto, it will be assumed that they misunderstood the evidence, or misapprehended its scope and effect. In such case the verdict should be set aside and a new trial granted. *Rankin v. Thompson et al.*, 331.

15. A party may not take advantage of an erroneous instruction given in his favor, and by which he could not have been prejudiced. *Leitensdorfer v. King*, 436.

16. The supreme court will not interfere with the finding of a jury upon a disputed question of fact, in connection with which there is a material conflict in the testimony, unless such finding is so unreasonable as to create a strong presumption that they were in some way misled, or were controlled by improper motives, or influenced by passion or prejudice. *Ib.*

PRACTICE IN THE SUPREME COURT — Continued.

17. The justices of the supreme court, acting singly out of term, are without jurisdiction to issue writs of *habeas corpus*, or to hear and determine matters arising thereon, notwithstanding the authority attempted to be conferred by the statute on *habeas corpus*. *In re Garvey*, 502.

18. In the supreme court briefs must be filed in accordance with the orders entered, or the causes will be subject to dismissal for want of prosecution. *The Denver, W. & P. Ry Co. v. Woy et al.*, 556.

19. A referee was directed to try the issues presented and report findings upon the law and facts; exceptions were reserved and subsequently overruled, and judgment entered by the court on the referee's report; but no exceptions being reserved either to the ruling upon the issues presented by the report and the exceptions thereto nor to the final judgment rendered by the court, *held* that the supreme court is precluded from reviewing the judgment on the evidence. *Poire v. Rocky Mountain T. Co.*, 588.

PRINCIPAL AND AGENT: See AGENTS.

PRIVATE PROPERTY: See DAMAGES, 5, 6, 7, 8, 9, 10.

PROCESS:

1. In obtaining constructive service of process by publication, a strict compliance with the method pointed out by the statute must be observed. *Israel v. Arthur*, 5.

2. If the record, being offered in evidence, shows affirmatively that the statute requiring service by publication was not complied with, it may be attacked in a collateral proceeding, and the recital therein that service was had does not change the rule. *Ib.*

3. Where service by publication is relied upon, it must be in a case and under circumstances wherein that mode of acquiring jurisdiction is authorized by the statute, and the material requirements of the statute must be complied with. *Brown v. Tucker*, 30.

4. Where service is obtained by publication of the summons, the defendant has forty days to answer the complaint after the service is complete. *Ib.*

5. Errors in the service of summons by publication may be waived by the appearance and answer of defendant to the merits. *The New York & B. M. Co. v. Gill*, 100.

6. Under the statutes of this state the service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity. *Toeniges v. Drake*, 471.

PROMISSORY NOTES:

1. "On or before March 12, 1883, I promise to pay to the order of A. two hundred dollars, at the City National Bank, with interest at ten per cent. per annum, value received. This note becomes due and payable when (if before March 12, 1882) A., B. & Co. shall dispose of a part or all their interest in the New York Hotel, or when the interest of B. may be sold or disposed of," *held*, to be a promissory note and not affected by the contingency appended. *Kiskadden v. Allen*, 206.

2. When a party indorses a note at the time it is made, and before delivery to the payee, and with a clear understanding that the note would not be accepted unless so indorsed, the party so indorsing such note will be considered as a joint maker, and may not set up want of consideration moving to him. *Ib.*

QUO WARRANTO:

1. Where a banking corporation, under the statute, fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture. *The People ex rel. v. City Bank*, 226.

2. The doctrine of this court is that section 21, article 5, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force. *The People ex rel. v. Fleming et al.*, 280.

3. The repealing clause of a statute is to be understood as designed to repeal all conflicting provisions in order that the new statute can have effect. And when the statute itself is held to be invalid, nothing can conflict with it and therefore nothing is repealed. *Ib.*

4. Articles of incorporation which declare an intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads, in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," held, in an action in the nature of a *quo warranto*, not to indicate an attempt to create an ordinary railroad company, under sec. 333 *et seq.*, General Statutes. *People ex rel. Bernard v. Cheesman et al.*, 876.

5. In this state a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority. *Ib.*

6. The failure of the notary public before whom articles of incorporation are acknowledged, to certify that the parties acknowledging the same are personally known to him, is not fatal. A certificate that the persons whose names are signed to the articles (giving them) appeared before the notary and acknowledged the same, is sufficient. Neither the provisions of the statute as to the acknowledgment of deeds, nor the reasons therefor, apply to the acknowledgment of articles of incorporation. *Ib.*

RAILROADS:

1. Abutting lot owners have a peculiar interest in the street not shared by others. Their easement is property within the meaning of our constitution, and any interference therewith which results in injury will (with certain exceptions) be justly compensated—there being a *damaging*, if not a *taking*, of private property. Whatever interference with the street permanently diminishes the value of their premises is as much a damage as though caused by direct physical injury thereto. *City of Denver v. Bayer*, 113.

2. But sometimes these interferences and the resulting injury may properly, even in this state, be held to be *damnum absque injuria*—as where they are occasioned by a reasonable improvement of the street by the proper authorities for the greater convenience of the public; or where a temporary inconvenience or injury results from a legitimate use thereof by the public. In purchasing his lot or dedicating the easement to the public, the abutting owner is con-

RAILROADS — Continued.

clusively presumed to have contemplated the power and authority of the city council to skilfully make reasonable changes and improvements, by raising or lowering the grade, or otherwise. But these presumptions attach only when the purpose of the change is to render the street more convenient and useful as a public highway. *Ib.*

3. While it may be said that bridges, culverts, and even street railways, are matters contemplated by the lot owner when he purchases, no such presumption applies to the use of the street by an ordinary railroad. *Ib.*

4. For any injury and annoyance occasioned by such railroad, which are peculiar to an abutting owner, and not shared by the general public — which affect his property and impair its value without injuring that of his neighbor, — he ought to receive compensation, though the city hold the fee and grant the right of way. *Ib.*

5. If the city by ordinance only gives consent on behalf of the corporation and the public that the street may be used by a railroad, the city would not be liable; and if it was intended by the ordinance to confer upon the railroad company a right to use the street without compensation to adjoining owners, where permanent injury resulted from such use, the ordinance is, in this respect, *ultra vires* and void. The relation of principal and agent does not exist in such case. *Ib.*

6. For injuries of this kind a single recovery can be had for the whole damage to result from the act. The measure of compensation (in suit between the proper parties) is the actual diminution in the market value of the premises, for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street. *Ib.*

7. Articles of incorporation which declare an intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads, in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," held, not to indicate an attempt to create an ordinary railroad company, under sec. 333 *et seq.*, General Statutes. *People ex rel. v. Cheesman et al.*, 376.

RECORD:

1. If the record, being offered in evidence, shows affirmatively that the statute requiring service by publication was not complied with, it may be attacked in a collateral proceeding, and the recital therein that service was had does not change the rule. *Israel v. Arthur et al.*, 5.

RECORDER:

1. A recorder is not compellable, by *mandamus*, to allow abstract makers to use his office and the county records for the purpose of abstracting the entire records of the land titles of the county for sale. *Bean v. The People*, 200.

REPEAL:

1. The repealing clause of a statute is to be understood as designed to repeal all conflicting provisions in order that the new statute can have effect. And when the statute itself is held to be

REPEAL — Continued.

invalid, nothing can conflict with it and therefore nothing is repealed. *The People ex rel. v. Fleming et al.*, 280.

2. If a patent on its face shows that it is issued under and in pursuance of certain acts of congress, and it is true that such acts were repealed prior to the application therefor, the patent is void, and may be impeached in a court of law. *Schwenke v. Union D. & R. R. Co.*, 512.

3. A local and special statute, which adopts, by reference, provisions relating to procedure from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted. *Ib.*

4. The law does not favor repeals by implication. The legislative intent to substitute the new for the old law must clearly appear. A stronger repugnancy is necessary where the repeal of a prior special act is claimed to result from the subsequent passage of a general law. The reluctance to recognize a repeal by implication, in the latter case, is still greater when the prior statute is not merely special or local in its operation, but also relates to a purely local subject. *Ib.*

REPLEVIN:

1. The code requires that the defendant's answer shall contain a specific denial to each allegation in the complaint intended to be controverted, and every material allegation not controverted shall, for the purposes of the action, be taken as true; therefore, *held*, that an averment of value of goods and damages for their detention, in the complaint, in an action of replevin, are material allegations, and a failure to deny them is to admit them to be true. *Tucker v. Parks*, 62.

2. Where property is found by the officer in the actual custody of the person named in his execution, the levy thereon gives the officer lawful possession; and in such case a demand is an essential prerequisite to suit in replevin against the officer. But when the property is found in custody of a stranger to the writ, the officer's possession under his levy is wrongful and no demand is necessary. *Stone v. O'Brien*, 458.

3. Declarations of the party in possession, explanatory of the possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession, or such was the title claimed; they are no evidence of the title actually held; and where the issue is, not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are not admissible. *Ib.*

RETROSPECTIVE LEGISLATION:

1. The legislature may, by statute, validate judicial proceedings where the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their substantial rights. But it cannot, by retrospective legislation, give vitality to previous judicial proceedings which were void for want of jurisdiction over the parties. *Israel v. Arthur et al.*, 5.

ROAD TAX:

1. The provision in the statute (Laws 1879, p. 159, sec. 1), concerning taxes for road purposes, exempting from such taxes all property within the limits of incorporated towns or cities, is in

ROAD TAX — Continued.

conflict with sections 3 and 6 of article X of the state constitution, and is therefore void. *Board of Com'rs Gunnison Co. v. Owen et al.*, 467.

2. Had the legislature undertaken to commute this tax for an equivalent burden to be borne by cities and towns, or provided that the tax collected from property within such corporations should be expended on the streets thereof, or declared that a similar and equal tax should be collected and expended therein, the objection might be obviated. *Ib.*

3. The unconstitutionality of one part of a statute does not necessarily render the residue thereof void. *Ib.*

SECRET TRUST:

1. *Bona fide* creditors should be accorded preference over a secret and hidden equity against the property of the debtor, of which they knew nothing at the time of giving credit; and provision to this end may be effectual in a decree entered in a suit to which such creditors are not parties by "saving their rights." *Buck v. Webb et al.*, 212.

2. In an action by a creditor to enforce his right of precedence over the holder of such secret trust, all the parties in interest may be joined and the whole controversy settled in one suit. *Ib.*

SET-OFF:

1. In this case *held*, that if it be conceded that defendant would be entitled, upon a proper showing, to damages by way of set-off against the plaintiff's demand, he proved no damages, and therefore cannot be heard to complain after judgment. *James v. Duke*, 282.

SHEEP:

1. It is the duty of the herder in charge of a flock of sheep to use ordinary care to prevent their trespassing upon crops, and, in the absence of such care, the owner will be held responsible for resulting damages. *Morris v. Fraker*, 5 Col. 425, distinguished. *Willard v. Mathesus*, 76.

SHERIFF:

1. Though no fees are fixed by the statute for the care of property held by a sheriff under attachment, yet the rule is now settled that the officer is entitled to reimbursement for such reasonable charges therefor as may be allowed as costs by the court or judge. *The City Bank of Leadville v. Tucker*, 220.

2. In such case the plaintiff who sues out the attachment and causes the levy is liable, if his suit be dismissed, to the sheriff for such sum as may be so allowed, and it is proper to tax these charges as part of the costs in the case. *Ib.*

3. In such case, if the amount taxed is excessive, the plaintiff, by motion to retax, has a remedy for the enforcement of his rights, as complete as if the sheriff were required to bring an action for such expenditures, the reasonableness of which he might contest by answer. *Ib.*

SPECIAL LEGISLATION:

1. While the prevailing spirit of the constitution is opposed to special legislation, it is not, however, prohibitory of all special legislation, but only such as relates to certain specified subjects, and to such other cases where general laws are applicable. *Brown v. The City of Denver*, 305.

STATUTES:

1. The legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation on that power, the court will look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited. *Alexander et al. v. The People*, 155.

2. When the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist. *Ib.*

3. The doctrine of this court is that section 21, article 5, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title is without force. *People ex rel. v. Fleming et al.*, 230.

4. The repealing clause of a statute is to be understood as designed to repeal all conflicting provisions in order that the new statute can have effect. And when the statute itself is held to be invalid, nothing can conflict with it and therefore nothing is repealed. *Ib.*

5. The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred. *Simmons v. California P. Co.*, 285.

6. Under this rule, held that, by the fourteenth subdivision of section 1 of the attachment act of 1881, the legislature intended to define a separate and additional ground of attachment. *Ib.*

7. A liberal construction must be given to the provisions of the Civil Code, to the end that the legislative intent may be made effectual. Under section 116, the proceeds of attached property may be prorated between the creditors therein specified — the words "returned to the same term of the court to which they are returnable," being interpreted to mean and apply to all writs of attachment which are in fact returned to at or during the same term of the court, at or during which they may be properly returned, after service according to law. *Daniels et al. v. Lewis et al.*, 430.

8. The provision in the statute (Laws 1879, p. 159, sec. 1), concerning taxes for road purposes, exempting from such taxes all property within the limits of incorporated towns or cities, is in conflict with sections 3 and 6 of article X of the state constitution, and is therefore void. *Board of Com'rs Gunnison County v. Owen et al.*, 467.

9. Had the legislature undertaken to commute this tax for an equivalent burden to be borne by cities and towns, or provided that the tax collected from property within such corporations should be expended on the streets thereof, or declared that a similar and equal tax should be collected and expended therein, the objection might have been obviated. *Ib.*

10. The unconstitutionality of one part of a statute does not necessarily render the residue thereof void. *Ib.*

11. A local and special statute, which adopts, by reference, provisions relating to procedure from an existing general law, is not necessarily abrogated or affected by the subsequent repeal of the act containing the provisions adopted. *Schwenke v. Union D. & R. R. Co.*, 512.

12. The law does not favor repeals by implication. The legislative intent to substitute the new for the old law must clearly appear. A stronger repugnancy is necessary where the repeal of a prior

STATUTES — *Continued.*

special act is claimed to result from the subsequent passage of a general law. The reluctance to recognize a repeal by implication, in the latter case, is still greater when the prior statute is not merely special or local in its operation, but also relates to a purely local subject. *Ib.*

13. The code (1888, section 387) provides that printed copies in volumes of statutes, or other written law of any other state or territory or foreign government, purporting or proven to have been published by the authority thereof, shall be admitted by courts on all occasions as presumptive evidence of such laws. *Bruckman v. Taussig*, 561.

14. A comparison of section 2 of the statute establishing the State Industrial School with section 6 of article 4 of the constitution, shows that while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate. *The People ex rel. v. Osborne*, 605.

15. There being no constitutional restrictions imposed, it is competent for the legislature to provide the manner of making original appointments, the terms of office, how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. *Ib.*

16. It is a fundamental rule of interpretation that every law is adopted as a whole; and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. The intent and purpose of a law is to be considered in its interpretation. *Ib.*

17. The word vacancy has no technical or peculiar meaning, as used in the statute (Laws 1881, p. 132, sec. 2); it means empty and unoccupied, as applied to an office without an incumbent. An office is not vacant while any person is authorized to act in it, and does so act. *Ib.*

See EMINENT DOMAIN.

STATUTE OF FRAUDS:

1. The statute of frauds has changed the rule of evidence, not the rule of pleading. A plea which set forth a contract for the conveyance of real estate is good on demurrer, though it does not aver that the contract was in writing — it not appearing in the plea that it was *not* in writing. *Tucker v. Edwards*, 209.

2. As to exempt property, there are within the statute of frauds no creditors; so that the sale of a homestead is no fraud upon the rights of creditors of the grantor — the same not being subject to their debts. The exemption law and statute of frauds are *in pari materia*, and must be construed together. *Barnett et al. v. Knight et al.*, 365.

3. Under the statute of frauds, as interpreted by this court, the vendee of chattels must take the actual possession, and the possession must be open, notorious and unequivocal, such as to apprise the community, or those accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller to the purchaser. *Wilcox et al. v. Jackson*, 521.

STREETS: See MUNICIPAL CORPORATIONS; DENVER; DAMAGES, 5, 6, 7, 8, 9, 10.

SUCCESS:

1. What amounts to ultimate success in a law suit is a question of law for the court. *Leitensdorfer v. King*, 486.

SUMMONS:

1. Under the statutes of this state the service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity. *Toeniges v. Drake et al.*, 471.

See PROCESS:

SURVIVING PARTNER:

1. The surviving partner of an insolvent firm may make an equitable and just assignment of the partnership effects for the equal benefit of all the firm creditors; but, in his position as trustee, he is not permitted to make an assignment and give preference therein to certain creditors. *Salsbury v. Ellison*, 107.

TAX:

1. The provision in the statute (Laws 1879, p. 159, sec. 1), concerning taxes for road purposes, exempting from such taxes all property within the limits of incorporated towns or cities, is in conflict with sections 8 and 6 of article X of the state constitution, and is therefore void. *Board of Com'rs Gunnison County v. Owen et al.*, 467.
2. Had the legislature undertaken to commute this tax for an equivalent burden to be borne by cities and towns, or provided that the tax collected from property within such corporations should be expended on the streets thereof, or declared that a similar and equal tax should be collected and expended therein, the objection might have been obviated. *Ib.*
3. The unconstitutionality of one part of a statute does not necessarily render the residue thereof void. *Ib.*

TENANT:

1. Section 1493 of the General Statutes, regarding the change in the terms of a lease, applies to tenancies from month to month, and not to a tenancy for one month. *Reithman v. Brandenburg*, 480.
2. A tenant of demised premises holding over is deemed in law to hold as tenant at the same rent previously paid, if there be no new agreement. But if he has notice from his landlord that, in case he retains possession, he must pay a higher rent, specified as to amount at the time, he must be deemed to assent to such increased rental. *Ib.*

See FORCIBLE ENTRY AND DETAINER, 3.

TENANT IN COMMON:

1. In ejectment one tenant in common may recover possession of the entire tract as against all persons but his co-tenants. *Weese et al. v. Barker et al.*, 178.

See EJECTMENT.

TIME CHECKS:

1. Time checks are assignable obligations, and need not be accepted. *The Rio Grande Extension Co. v. Coby*, 299.
2. In an action upon such "time checks," it is necessary to offer some proof of the agency of the person by whom they were made, unless there is a waiver of the same. Otherwise nonsuit should be allowed. *Ib.*

TITLE:

1. Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to a trespass, and cannot form the basis for the acquisition of title. *Weese et al. v. Barker et al.*, 178.

2. Where, by the subject-matter of a cross-bill, a contest directly involving title to mines is instituted, the bill alleging that the deed thereto, executed and deposited in escrow by one party, was surreptitiously obtained by the other; that the conditions of sale had not been complied with, and by reason thereof no title had passed; praying affirmative relief, and that the deed be surrendered up to be canceled, and the decree denied the relief prayed for,—*held*, that the decree related to a freehold, and was reviewable on appeal. *Atkinson et al. v. Tabor et al.*, 186.

3. The government does not part with title to the public domain until the issue of a patent therefor; however, when such patent has issued, the title conveyed thereby is held to relate back to the date of the entry, as evidenced by the certificate thereof, but will not relate back to an act of congress authorizing the entry merely. *City of Denver v. Mullen et al.*, 345.

4. Title procured to that which may properly be termed a trust estate, by the trustee, for his own advantage, and against the interest, and without the consent, of his beneficiary, will be declared in equity to be held in trust for the latter. And one who, with full knowledge of the situation, colludes with the trustee in procuring such adverse title is in no better position than the trustee himself. *Wells v. Francis et al.*, 396.

5. The rule in ejectment, that the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary, is *held* not to apply to possessory actions for mining claims, where neither party has, strictly speaking, any legal title, but where the prior possession of the plaintiff is pitted against the present possession of the defendant. *Strepey et al. v. Stark et al.*, 614.

See EJECTMENT.

TITLE BOND:

1. The relation of the parties to a title bond is that of mortgagor and mortgagee; the action for a vendor's lien is analogous to the foreclosure of a mortgage; and the rule that a person claiming adversely to the title mortgaged need not be made a party applies to the former as well as the latter action. A strong analogy also exists between the action for a vendor's lien and a suit for specific performance, but in the latter the above rule as to adverse claimants likewise prevails. *Wells v. Francis et al.*, 396.

2. If it does not appear on the face of a contract, or otherwise, that the trustees act as agents, or in a fiduciary capacity, it is unnecessary to go beyond the terms of the contract. *Ib.*

TRESPASS:

1. Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to a trespass, and cannot form the basis for the acquisition of title. *Weese et al. v. Barker et al.*, 178.

TRIAL:

1. In purely equitable cases, the trial must be to the court, unless both parties consent to a trial by a jury. Neither the chapter on

TRIAL — Continued.

references, nor any other provision of the code, operates to deprive the court of the right, in such cases, to direct, upon its own motion, the taking and reporting of the evidence by a referee. The trial may be upon proofs thus taken, or upon testimony given in open court. *Sieber et al. v. Frink et al.*, 148.

TRUSTEES: See EQUITY, 8, 8.

UNCONSTITUTIONAL STATUTES:

1. A statute which assumes to limit or direct the compensation to be paid for private property, when taken for public or private use, is to that extent unconstitutional. *Tripp et al. v. Overocker et al.*, 72.

2. When, however, part only of an act is unconstitutional, it does not necessarily follow that the whole statute must fall, and the same is true of the different portions of the same section. Whether the valid portions shall be enforced depends upon the design of the entire law, and their connection with the void provisions. The act should be sustained, if the unconstitutional portions can be stricken out and the law still be such as to accomplish the purpose of the legislature. *Ib.*

VACANCY:

1. A comparison of section 2 of the statute establishing the State Industrial School with section 6 of article 4 of the constitution, shows that while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate. *The People ex rel. v. Osborne*, 605.

2. There being no constitutional restrictions imposed, it is competent for the legislature to provide the manner of making original appointments, the terms of office, how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. *Ib.*

3. It is a fundamental rule of interpretation that every law is adopted as a whole; and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. The intent and purpose of a law is to be considered in its interpretation. *Ib.*

4. The word vacancy has no technical or peculiar meaning, as used in the statute (Laws 1881, p. 132, sec. 2); it means empty and unoccupied, as applied to an office without an incumbent. An office is not vacant while any person is authorized to act in it, and does so act. *Ib.*

VENDOR AND VENDEE:

1. Upon discovery of fraud in a contract of sale, the vendee has his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages, either by original action or as a counterclaim to an action against him for the purchase money brought by the party committing the fraud. *Herfort v. Cramer*, 483.

2. It is well settled that the good will of a business may have a property value and form the subject-matter of a contract and sale; and the contract being an entirety, for the stock and good will, the vendor may not relieve himself of liability by proving that the stock was worth the amount of the purchase money. *Ib.*

3. If the property sold is more valuable than the consideration expressed in the contract, the profits of the bargain legitimately belong to the purchaser. *Ib.*

VENDOR'S LIEN:

1. The action for a vendor's lien may be maintained against one holding actual possession under a title bond of a part of the public domain, with extensive and valuable improvements thereon. *Wells v. Francis et al.*, 396.

VENUE:

1. Under the code (1877, secs. 431, 442), a judge who, before he went upon the bench, was of counsel in a case, is disqualified from presiding at the trial unless all parties consent that he may. And in such case it is his imperative duty (if county judge), of his own motion or on suggestion, to certify the case to the district court, without requiring petition for change of venue under the statute. *O'Connell v. Gavett*, 40.

2. In the absence of any statutory provision, the general rule is that costs abide the event of the suit, and in case of a change of venue from the county court, on the ground of the disqualification of the judge, there is no authority to make the payment of costs a condition precedent to such change of venue. *Id.*

3. Under section 28 of the code, action upon a contract, wherein no place of performance is specified, may be brought in the county where the plaintiff resides. *Bean v. Gregg*, 499.

4. In a petition for change of venue, either in respect to the prejudice of the judge or the inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. *De Walt v. Hartzell et al.*, 601.

VERDICT:

1. If conflicting and irreconcilable propositions of law are contained in the charge, and it appears that the jury may have been misled thereby, a new trial should be granted; but if, upon a careful consideration of the entire charge, though there be conflict between some portions thereof, it appears that the complaining party could not have been prejudiced by it, the supreme court will not disturb the verdict on account of imperfections therein. *The Overland M. & E. Co. v. Carroll*, 43.

2. Where an amount is acknowledged in the pleadings to be due plaintiff, it is error to find a verdict or render a judgment for a less amount than that admitted by the pleadings. *Coffman et al. v. Brown*, 147.

3. The supreme court will only interfere with the finding of a jury on the evidence, when, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties. *Green v. Taney*, 278.

4. When there is no substantial conflict in the evidence as to a material fact, and the jury find contrary thereto, it will be assumed that they misunderstood the evidence, or misapprehended its scope and effect. In such case the verdict should be set aside and a new trial granted. *Rankin v. Thompson et al.*, 381.

5. Where there is direct conflict in the evidence, it is the province of the jury to determine to whom credit should be given, and the verdict, not being clearly opposed to the weight of evidence, will not be disturbed. *Barth et al. v. Jones et al.*, 464.

See JUDGMENT, 18.

VOTE:

1. When the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale, and, having fixed in the statute the vote which shall be required, it becomes the paramount law, and nothing is left for implication. *Alexander et al. v. The People*, 155.
2. The act of 1876, requiring a two-thirds vote in favor of the removal of county seats, has no application to the county of Grand. *People ex rel. v. Commissioners of Grand County*, 190.

WAIVER:

1. A condition of an accord agreement, like that of any other contract, may be waived by the parties thereto. *Cary v. McIntyre*, 178.
2. A fund in litigation deposited in a bank which is deemed unsafe; an appeal pending from a judgment disposing of same; a person having a contingent interest in the fund, in common with appellants, withdraws a portion thereof from the bank, with the sole purpose of saving it, in view of the failing condition of bank — the appellee having refused to consent to a change of the place of deposit: *Held*, that the withdrawal is not such an appropriation of the fund in litigation as amounts to a waiver of the right to prosecute the appeal. *Atkinson et al. v. Tabor et al.*, 451.
See APPEAL, 8.

WATER RIGHTS:

1. In an adjudication by a referee, under the statute as to priority of water rights, the decree may be modified for error of the referee in his judgment upon the weight of the testimony. *Dorr v. Hammond*, 79.
2. If the construction of a ditch be prosecuted with reasonable diligence, the right to water therethrough relates back to the commencement thereof. *Sieber et al. v. Frink et al.*, 148.
3. A failure to use water is competent evidence of an abandonment of the right thereto; and if continued for an unreasonable period, it creates a presumption of an intention to abandon; but this presumption is not conclusive and may be overcome by other satisfactory proofs. *Ib.*
4. A change of the point of diversion on the same stream does not affect the priority acquired by the original appropriation, provided the quantity of water diverted remains the same, and no intervening appropriator is injured. *Ib.*
5. To acquire a right to water from the date of diversion one must, within a reasonable time, employ the same in the business for which it was taken. *Ib.*

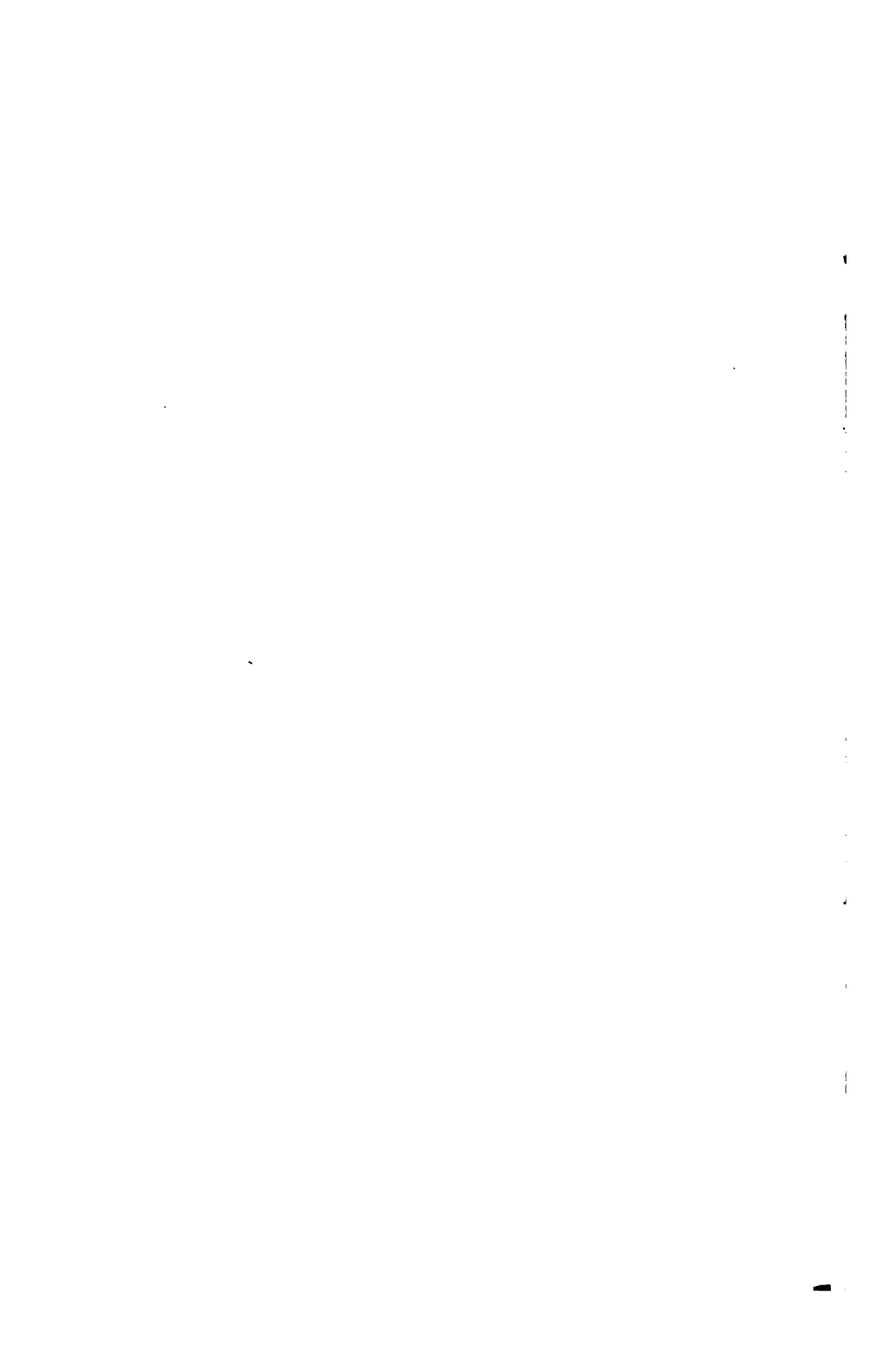
WEIGHT OF EVIDENCE:

1. The weight of evidence does not wholly consist in its volume nor in the number of individuals sworn. *Green v. Taney*, 278.

VOL. VII — 44

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72/7 23



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